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No. 88-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Vicki Frost was arrested and jailed when she requested exemption for her second grade daughter from certain required reading books on the basis of religious objections. Her petition raises the following questions:

1. May a public school refuse to exempt a student who, along with parents, raises sincere religious objections to certain required books in a reading class?

2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from those books?

3. May public schools expel children from all aspects of the public school curriculum, and thereby deny a public benefit, if they and their parents object on sincere religious grounds to one portion of the school curriculum?

4. Do public schools have a constitutional duty to provide reasonable education alternatives to accommodate the sincere religious objections of a few students and parents to specific curricular materials?

PARTIES

All parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on July 12, 1988.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit appears at 851 F.2d 822 (6th Cir. 1988). It appears in the appendix at 1a. The jury verdict appears at 16a. The federal district court issued no written opinion in this case.

JURISDICTION

This case seeks review of a decision of the U.S. Court of Appeals for the Sixth Circuit entered on July 12, 1988. This is a civil case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are the First Amendment and the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983 and two Tennessee statutes, Tenn. Code Ann. § 49-818 (recodified as § 49-6-2008) and Tenn. Code Ann. § 39-3-1204. They appear in the Appendix at 18a.

STATEMENT OF THE FACTS

This is a First Amendment case involving the false arrest and false imprisonment of Vicki Frost because of her going onto school grounds to express her religious objection to certain textbooks to school officials and to petition for exemption of her daughter Sarah from objectionable texts. This case is related to but different from the well-publicized "Tennessee Textbook" controversy. *See Mozert* v. *Hawkins County Public Schools*, 647 F.Supp. 1194 (E.D.Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988).

Vicki Frost was arrested and jailed when she requested exemption for her second grade daughter from certain required reading books on the basis of religious objections. A state trial judge dismissed all criminal charges against Mrs. Frost. In a subsequent federal court trial, a jury awarded Mrs. Frost $70,000 damages against the

school district for violating her constitutional rights. The Sixth Circuit Court of Appeals reversed the verdict.

A. Sincere Religious Objections And Exemption Request

In the fall of 1983, Vicki Frost, as a Christian parent in Hawkins County, Tennessee became concerned about the content of stories in a reading series used by the reading class in local public schools; the series was published by Holt, Rinehart and Winston (the "Holt reading books"). The parents complained to school officials that the Holt reading books were not limited to mere reading skills, but conveyed with implicit or explicit approval various ideological and religious themes that Mrs. Frost and her daughter found violated their religious beliefs. The religiously objectionable themes included occultism, secular humanism, evolution, disobedience to parents, feminism, and pacifism.

Mrs. Frost asked school officials to exempt her daughter from the religiously objectionable books and to accommodate their sincere religious beliefs. The parents suggested many alternatives, such as having the students sit in the library while the Holt reading books were used, having the children learn reading from different books, having the parents pay for an additional teacher for the school district to use different reading books, or having the parents home educate their children.

Defendants refused to exempt Sarah Frost from the religiously objectionable books. Although some of the principals did successfully provide alternative reading books and programs for the students, Principal Jean Price of Church Hill Elementary School refused to allow Sarah Frost to use alternative reading books. Mrs. Frost's two junior high children did receive and use alternative reading books.

B. Denial Of Exemption And Of Accommodation

Thereafter, the Hawkins County School Board voted unanimously to refuse to exempt any students from using the Holt reading books, on November 9, 1983. Mrs. Frost reiterated to Principal Jean Price her religious objections to the reading books. Sarah was allowed to sit alone in the classroom but was effectively forced to listen during reading class, and Mrs. Frost asked the school to remove her daughter from the classroom during reading because of their objection to being forced to listen to reading from the offensive books. Mrs. Frost offered to teach reading to Sarah during the times she was not in the classroom, but Principal Price advised Mrs. Frost that she would be in violation of the Tennessee truancy laws, which carry criminal penalties.

Mrs. Frost then went to Principal Price's office in order to ask to take Sarah out of the reading class, on November 21, 1983. Price, and some other school officials, said Sarah would not be exempted and must use the offensive textbook if she wanted to remain in public schools, and suggested that Mrs. Frost enroll Sarah in a Christian school. That day, Mrs. Frost was permitted to remove Sarah from the class. That evening, Price sought advice from the county attorney as to whether a certain state trespassing law applied to the situation.

On the next day, Mrs. Frost returned to remove Sarah from class. They were prohibited from remaining in the school cafeteria, and so went to Mrs. Frost's vehicle in the school parking lot. Shortly, thereafter Chief of Police Joe Ashbrook arrived to talk to Price, and then went to Mrs. Frost's vehicle to order her to leave the school grounds. Ashbrook and Price then sought instruction from Superintendent Bill Snodgrass on how to handle the situation.

That evening, Mrs. Frost, fearful of Price's intentions, called the police and requested that they escort her into the school the next morning to witness that her conduct was peaceful and lawful. The next morning, on November 23, 1983, Mrs. Frost went to Sarah's class to remove her daughter from the reading class, and upon being told that a Thanksgiving program had delayed reading period, she went to Price's office. While in Price's outer office, Mrs. Frost again called the Church Hill Police Department to see if a policeman could be sent to witness her peaceful and lawful behavior. Chief of Police Ashbrook came within four minutes. Price asked Ashbrook why he was there, and Mrs. Frost said she called him.

C. Arrest And Jailing Of Mrs. Frost And Compelled Indoctrination Of Sarah

Price ordered Mrs. Frost to leave the school premises, and an indisputably non-volatile, non-disruptive exchange ensued, with Mrs. Frost inquiring why she had to leave, and Price reiterating her order. Price handed Chief of Police Ashbrook Tennessee Code Annotated § 49-818 (recodified § 49-6-2008), and he then read the statute to Mrs. Frost, and told her to leave or be arrested. The statute reads in part:

> Persons improperly on school premises. — (a) In order to maintain the conditions and atmosphere suitable for learning, no person shall enter onto the grounds or into the buildings or public schools during the hours of student instruction *except* students assigned to that school, the staff of the school, *parents of students*, and other persons with lawful and valid business on the school premises. [Emphasis added].

After hearing Chief of Police Ashbrook read the statute, Mrs. Frost said the law did not apply to her because

she was a parent with a student at that school. When Ashbrook again told her to leave or be arrested, Mrs. Frost said she was not leaving her child who was about to be subjected involuntarily to the reading class, and was arrested as she went through the office door into the hall.

Ashbrook quickly placed Mrs. Frost in a squad car and drove her to the Hawkins County Jail, where she was searched, fingerprinted, photographed, and placed in a cell with other prisoners for two hours. After a warrant was drafted by Ashbrook and the judge, she was taken before the same judge, who handwrote the complaint with Ashbrook. The judge released Mrs. Frost on her own recognizance on the condition that she not go on the property of the Hawkins County Public Schools. The police offered her no assistance to return to her unattended vehicle 30 miles away.

Ashbrook testified that the district attorney general had advised the judge, before the judge and Ashbrook collaborated for two hours to draft the complaint, that it was doubtful that Mrs. Frost violated the statute under which she was arrested. Therefore, the judge and Ashbrook searched the Tennessee Code Annotated, and found another statute with which to charge her—Tenn. Code Ann. § 39-3-1204. It is undisputed that immediately below the statute, on the same page of the Tennessee Code Annotated, there is a note saying that the statute was declared unconstitutional in the case of *Baxter* v. *Ellington*, 318 F.Supp. 1079 (E.D.Tenn. 1970). All relevant events occurred in the Eastern District of Tennessee from which the *Baxter* decision had issued.

D. Expulsion Of Frost Children And Malicious Prosecution Of Mrs. Frost

The school officials thereafter expelled the two older Frost children from the entire school curriculum,

although the family only objected to the books used in the reading class. The Frost family then enrolled Sarah and the older two children in Christian private schools, incurring considerable expense.

The district attorney prosecuted Mrs. Frost. She was required to appear in court for an arraignment, at which Mrs. Frost pled not guilty. Mrs. Frost also appeared at a preliminary hearing to determine whether there was probable cause to refer the case to the grand jury. Widespread publicity surrounded the hearing in a packed courtroom, with many school employees present. Those in attendance directed much hostility toward Mrs. Frost.

After a full evidentiary hearing, including testimony by Ashbrook, the same judge who helped draft the complaint, dismissed the charges because of the inapplicability of Tenn. Code Ann. § 49-818 and the unconstitutionality of Tenn. Code Ann. § 39-3-1204.

The arrest, incarceration and prosecution of Mrs. Frost destroyed her impeccable reputation, and she was branded falsely by school officials at public rallies as a rabble rouser, a nuclear plant picketer, one specially schooled in techniques of public school disruption, and a religious fanatic. All of the above humiliated the Frosts and adversely affected her and Sarah's emotional state, their ability to circulate in the community without harrassment, and Mrs. Frost's ability to perform as a mother and a wife.

STATEMENT OF THE PROCEEDINGS

Mrs. Frost filed in a timely fashion this lawsuit under 42 U.S.C. § 1983 for violation of her constitutional rights. After considerable pretrial discovery, the trial by jury commenced in January 1986. The jury returned a general

verdict of $70,000 compensatory damages against Hawkins County Board, and the judgment was entered.

Mrs. Frost filed post-trial motions for judgment of liability against Price, Ashbrook, and Snodgrass notwithstanding the verdict, and a new trial on damages. Mrs. Frost also moved to set aside the directed verdict and judgment of dismissal against Church Hill, for an injunction, and for additur, and for partial new trial on damages against the Hawkins County School Board. Hawkins County School Board moved for judgment notwithstanding the verdict, a new trial, or remittitur. All motions were denied, and notices of appeal were filed by the Hawkins County School Board and Mrs. Frost.

On July 12, 1988, the Sixth Circuit reversed the verdict, and ordered the lower court to grant a motion notwithstanding the verdict on behalf of the school district.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS QUESTIONS OF EXTRAORDINARY IMPORT WHICH NEED TO BE SETTLED BY THIS COURT.

A. The Right To Exemption, To Protection From Incarceration, And To Nonexpulsion For Sincere Religious Exercise Is A First Amendment Question Of Extraordinary Import.

This case raises the important constitutional questions whether public schools must exempt students from religiously-objectionable materials if nonexemption is not required by a compelling interest served by the least burdensome means; whether public schools may arrest and jail parents who nondisruptively come onto school grounds to state religious objections, to petition for exemption, and to withdraw their children; and whether public schools may expel children from all courses if they object to one course or text series.

B. The Right To Accommodation Of Sincere Religious Exercise Is A First Amendment Question Of Extraordinary Import.

This case also raises the question whether public schools have the constitutional duty to accommodate the sincere religious objections of the Frosts and similar students and parents by providing educational alternatives whose use would not frustrate a compelling interest. The absence of a threatened compelling interest and of the least burdensome means is evident, because many public school officials accommodate religious-based parental objections to certain learning materials. In sharp contrast, the Hawkins County School District responded with coercion and an unconstitutional condition on a public benefit, claiming that the students must totally leave the entire public school system if they asked for an alternative for any portion of the curriculum. The school district's "calloused indifference"[1] to the parental requests for alternative reading books climaxed at a frightening crescendo, when the principal of Church Hill Elementary School had Vicki Frost arrested, when she requested in a nondisruptive fashion that her daughter be excused from the reading class using the offensive book, and when she sought to teach her daughter reading.[2] The school district

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[1] *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

[2] In the related case, *Mozert* v. *Hawkins County School District*, 647 F.Supp. 1194 (E.D.Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988), the trial court ruled that allowing the parents to home educate their children in reading under the relevant Tennessee statutes was one "least restrictive" alternative available to promote the state's interest in making sure children are properly educated. The trial court emphatically rejected the notion that the school district could not tolerate any alternative education, and had to expel anyone who refused on grounds of conscience to study from any objectionable book. *See* 647 F.Supp. at 1200-1202.

made no effort whatsoever to accommodate Mrs. Frost's religious beliefs in the instant case.

Although a jury of local residents agreed that Mrs. Frost's rights had been violated and awarded her $70,000 against the school district, despite widespread hostility toward the Frosts, the Sixth Circuit of the Court of Appeals reversed. The Sixth Circuit made the extraordinary claim that Mrs. Frost had no constitutional right violated, simply because she legally could have placed her daughter in a private school:

> Frost's claim that she was deprived of the custody of her child without due process is equally unsupported. Frost had been given notice on November 22, 1983, that she would no longer be permitted to remove Sarah from the regular reading class. Despite this knowledge, *and her unencumbered freedom to transfer Sarah to a private school* (an option which Frost exercised on December 14, 1983), Frost chose to send her daughter back to Church Hill Elementary School and renew her disruption of the school's normal routine. For these reasons, we hold that the district court erred in refusing to grant the Board's motion for judgment notwithstanding the verdict.

851 F.2d at 827 (emphasis added).[3] The "disruption"

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[3] The Sixth Circuit's strange conclusion that the school district could arrest and jail Mrs. Frost because she could have avoided the controversy by enrolling her daughter in a private school, sounds unsettlingly similar to a legal argument firmly rejected by the Supreme Court in the free speech setting. In *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), the Supreme Court quoted an earlier case to reiterate, "It goes without saying that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" 408 U.S. at 119 n.40, quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939). *See also Consolidated Edison* v. *Public Service Comm'n*, 447 U.S. 530, 541 n. 10 (1980) and *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975).

merely consisted of a request for exemption from the reading class without exclusion from public school.

The Sixth Circuit clearly rooted its ruling against Mrs. Frost in the related decision, *Mozert* v. *Hawkins County Bd. of Ed.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988). There, the court ruled that a public school could expel students from all parts of the school day and curriculum, if they had religious objections only to a certain set of reading books, and that the school district had no constitutional duty to accommodate reasonably the religious minority's requests for alternative reading books.

The petitioner, Mrs. Frost, suggests that this Court should grant certiorari in this case, to review the important issues of parental rights and religious freedom in the public school realm.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH MAJOR DECISIONS OF THIS COURT

A. The Sixth Circuit Ignored The Appropriate Free Exercise Test, Because It Ignored The Requirement For A Compelling State Interest

The Sixth Circuit opinion's analysis clearly clashes with settled precedent of this Court that governmental intrusion on a person's rights under the Free Exercise Clause of the First Amendment can only be justified if they further a compelling state interest, implemented by the least restrictive means. *Thomas* v. *Review Board*, 450 U.S. 707, 718, 719 (1981); *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. ___, 94 L.Ed.2d 190. 197, 198 (1987).

The Sixth Circuit made no attempt to justify its ruling in light of these precedents, claiming merely that Mrs. Frost "disrupted" the school process (with no citation to

the record), although all evidence presented at trial showed that Mrs. Frost and the principal had a normal, unheated discussion about the situation. The school district never showed that exempting some students would necessarily disrupt school operations. The jury awarded $70,000 to Mrs. Frost against the school district for violation of her constitutional rights. The school district's strong-arm tactics were erroneously affirmed by the Sixth Circuit, without any appropriate application of the "compelling interest" and "least restrictive means" test. No compelling interest is threatened.

B. The Sixth Circuit Contradicted This Court's Decisions On The Constitutional Right To Exemption, When It Denied Exemption To Sarah Frost Without Showing Any Threat From Exemption To A Compelling Interest And Without Showing Why Exemption Is Not The Least Burdensome Means.

Exempting those with religious objections is the normal remedy in Free Exercise Clause cases, if there is a burden on sincere religious beliefs not supported by a compelling state interest performed in the least restrictive means. In this Court's Free Exercise Clause cases, the usual relief granted is to exempt the religious group or individual from some general governmental legal requirement. Some examples of exemption are as follows:

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943)—Jehovah's Witness exempt from state requirement for flag salute and pledge of allegiance in the public schools.

Sherbert v. *Verner*, 374 U.S. 398 (1963)—sabbatarian exempt from provision of South Carolina unemployment compensation statutory requirement.

Wisconsin v. *Yoder*, 406 U.S. 205 (1972)—Amish exempt from portion of Wisconsin compulsory attendance law.

Wooley v. *Maynard*, 430 U.S. 705 (1977)—Jehovah's Witness exempt from New Hampshire requirement to display "Live Free Or Die" on automobile license plates.

Thomas v. *Review Board*, 450 U.S. 707 (1981)—Jehovah's Witness exempt from provision of Indiana unemployment compensation law.

Jensen v. *Quaring*, 472 U.S. 478 (1985) (aff'd by equally divided Court)—Woman with religious objection to getting her photograph taken is excused from requirement that Nebraska drivers' licenses must bear pictures of the drivers.

Hobbie v. *Unemployment Appeals Commission*, 480 U.S. ____, 94 L.Ed.2d 190 (1987)—Sabbatarian exempt from portion of Florida's unemployment compensation law.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court allowed the Amish to be exempted from a part of the Wisconsin compulsory attendance law, and not attend school after the eighth grade. Therefore, in the public school setting, this Court has said that government officials must allow religious objectors to be exempt from school requirements, unless the government uses the least restrictive means to promote a compelling state interest.

Lower federal courts have also recognized a constitutional right to exemption for those who have religious objections to certain aspects of public school education.[4]

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[4] *E.g.*, *Spence* v. *Bailey*, 465 F.2d 797 (6th Cir. 1972) (religious pacifist exempted from mandatory ROTC class needed to graduate from high school in Memphis); *Moody* v. *Cronin*, 484 F.Supp. 270 (C.D.Ill. 1979) (Pentecostal girls were exempted from mandatory co-ed gym classes because they believed that the gym uniforms were "immodest apparel," and exposed them to the opposite sex in a way

The federal district court in *Mozert* correctly followed that principle, but was reversed by the Sixth Circuit on appeal. 827 F.2d at 1058.

C. The Sixth Circuit Erroneously Contradicted The Unconstitutional Condition Rule, Because It Allowed Public Schools To Compel An Unconscionable Choice Between Other Courses And Exemption From A Religiously Objectionable Course.

This Court has repeatedly ruled that the government cannot force a person to choose between obtaining an important governmental benefit or a religious conviction. To put it another way, the Constitution forbids the government from attaching a condition to receipt of a public benefit that requires a person to violate his religious convictions. In *Thomas* v. *Review Board*, 450 U.S. 707 (1981), this Court said,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

450 U.S. at 717-18.

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that violated their religious beliefs); *see also Florey* v. *Sioux Falls School District*, 619 F.2d 1311, 1316-17 (8th Cir. 1980) ("forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause"); *Wright* v. *Houston Independent School District*, 366 F.Supp 1208 (S.D.Tex. 1972) (teaching of evolution in public schools does not violate plaintiffs' religious beliefs, because they were allowed to be exempt from those classes).

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court echoed the principle that government cannot force people to choose between their constitutional rights and a public benefit:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Sunday worship.

374 U.S. at 404.

Clearly, public education is a governmental benefit. In *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972) this Court said that "providing public schools ranks at the very apex of the function of a State." The government cannot place conditions on the important benefit of public education which violate a person's religious beliefs, and then escape all constitutional duties for accommodation by saying that the Frosts could have enrolled their children in private schools, or home schooled them.[5]

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[5] This Court rejected a similar argument in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). In *Torcaso*, this Court said that the government may not require surrender of the opportunity of holding public office for exercise of religious convictions against professing belief in God. The state did not force *Torcaso* to pursue public office, but by condition (the oath) it denied him a benefit (opportunity for government employment). "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.* at 495-96.

Even in the context of private employers, this Court has interpreted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 to impose a duty on employers to reasonably accommodate the religious beliefs and practices of their employees. *Ansonia Board of Education* v. *Philbrook*, 479 U.S. ___, 93 L.Ed.2d 305 (1986); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). If a federal statute imposes a duty to make reasonable accommodations of religious beliefs, certainly the U.S. Constitution imposes a parallel duty on government actors.

In this case, the Hawkins County School District made no attempt to accommodate Mrs. Frost's religious beliefs. They had Mrs. Frost arrested, and made no effort to seek out a reasonable accommodation that would have protected the Frosts' religious beliefs, but fulfilled the state's interest in ensuring that children are properly educated (The trial court in *Mozert* found that allowing the parents to home school their children in reading was the least restrictive alternative to fulfill the state's compelling interest. See 647 F.Supp. at 1200-1202.

The school district attached an unconstitutional condition to public education "read all books, no accommodation, or leave the public school system." The Sixth Circuit erred in not requiring the school district to justify its coercive actions by showing that it has a compelling interest implemented by the least restrictive means.

D. The Sixth Circuit Erroneously Ignored Important Precedents Of This Court On The Government's "Duty To Accommodate" Religious Beliefs.

Moreover, this Court has reiterated that government has a "duty to accommodate" religious activities, in the decisions cited *infra*. The Sixth Circuit did not even mention this important constitutional principle in its opinion.

The Hawkins County School District made no attempt whatsoever to accommodate Mrs. Frost's religious beliefs, and refused to allow her to teach her daughter reading in a manner the federal district court found reasonable under state law in the related *Mozert* case.

This Court has oft reaffirmed the government's "duty to accommodate" religious beliefs. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Supreme Court stated the rule:

> [The First Amendment] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

465 U.S. at 673. In *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. ___, 94 L.Ed.2d 190 (1987), the Supreme Court recently reiterated that concept:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

94 L.Ed.2d at 200. *Accord*, *Walz* v. *Tax Commission*, 397 U.S. 644 (1970) and *Zorach* v. *Clauson*, 364 U.S. 306 (1952).

The Supreme Court has cautioned officials not to use the Establishment Clause as an excuse to justify mistreatment of religious people. In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), Justice Brennan, in his concurring opinion, said:

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here [citations omitted]. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

435 U.S. at 641. He added:

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities.

Id.

The Sixth Circuit made no attempt to explain why the school district does not have to obey this constitutional mandate to accommodate religious beliefs. This Court should grant certiorari in this case to reaffirm that the "duty to accommodate" religious beliefs applies to public school officials, too.

E. The Sixth Circuit Erroneously Ignored This Court's Landmark Cases On Parental Rights In Education.

This Court has recognized the constitutional power of parents to oversee their childrens' upbringing, including the area of education. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court spoke of that case in a way that describes this one:

> . . . this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nuture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

406 U.S. at 232.

Yoder reaffirmed *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). This Court in *Pierce* enunciated the oft-quoted principle of parental oversight of their childrens' upbringing:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. at 535.

The Sixth Circuit's breezy rejection of Mrs. Frost's legal claims made no mention of this important legal principle of parental rights, let alone made any attempt to distinguish this important line of cases. The Sixth Circuit's skewed ruling in favor of unbridled governmental power should be reviewed.

F. The Sixth Circuit Contradicted This Court's Precedent On The Requirement Of Probable Cause Before A Warrantless Arrest.

The Sixth Circuit failed to apply the "clearly erroneous" standard in overruling the factual findings of the triers of fact (the jury) in this case. The Sixth Circuit also erred by not applying the proper standards for constitutional and civil rights claims arising under circumstances of false arrest and false imprisonment. Government officials violate constitutional rights under the Due Process Clause if they arrest a person without probable cause. *See, e.g.*, *Hinshaw* v. *Doffer*, 785 F.2d 1260 (5th Cir. 1986).

In its zeal to make sure that Mrs. Frost lose, the Sixth Circuit turned a blind eye to the following facts:

Mrs. Frost was arrested, jailed, and charged solely for violating two Tennessee trespassing statutes. One had been declared unconstitutional 13 years earlier by the applicable federal judicial district, and the other law (read aloud to Mrs. Frost by the police chief who arrested her) clearly did not apply to parents on public school grounds. The state judge, seeing the weakness of the charges, dismissed both counts against Mrs. Frost.

The Sixth Circuit *did not* reverse on the grounds that the police chief had "probable cause" to arrest Mrs. Frost, nor could there be probable cause to think any law was violated. The Sixth Circuit instead reversed because Mrs. Frost had an "unencumbered freedom to transfer Sarah to a private school," a total nonsequitur. Certainly, the Sixth Circuit cannot carve out a "public school exception" to the general rule against false arrest, saying that public schools may arrest parents without probable cause on school grounds (expressly contrary to the Tennessee statute), for the sole reason that the parents could have placed their children in a private school or have home educated them. While students do not leave their constitutional rights behind at the schoolhouse gate, the Sixth Circuit finds that parents do leave their rights behind once they fail to choose private over public education. Such a mangled reading of the law twists this Court's principles to accomplish the result of ensuring that the conservative Christians lose.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

Date: October 10, 1988

Respectfully submitted,

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APPENDIX

APPENDIX

[851 F.2d 822 (6th Cir. 1988)]
Nos. 86-5680/5706

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

VICKIE FROST,
Plaintiff-Appellee, (86-5680),
Plaintiff-Appellant, (86-5706),

v.

HAWKINS COUNTY BOARD OF EDUCATION,
Defendant-Appellant, (86-5680),

JEAN PRICE, personally and in her official capacity as an employee and agent of Hawkins County Board of Education serving as principal of Church Hill Elementary School, Church Hill, Tennessee; JOE ASHBROOK, personally and in his official capacity as an employee and agent of the City of Church Hill, Tennessee serving as Chief of Police; HAWKINS COUNTY BOARD OF EDUCATION, a sub-division of the government of Hawkins County; BILL SNODGRASS, Superintendent of the Board of Education in Hawkins County,
Defendants-Appellees, (86-5706).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

Decided and Filed July 12, 1988

[851 F.2d 823] Before: MARTIN, JONES and WELLFORD, Circuit Judges.

JONES, Circuit Judge. In this civil rights action alleging prior restraint, false imprisonment and malicious prosecution, defendant Hawkins County Board of Education appeals the jury verdict for plaintiff-appellant Vickie Frost. Frost appeals the denial of certain pretrial and postjudgment orders. Upon consideration, we find that there is no basis for judgment against the defendant. Thus, we hereby reverse the district court's decision and grant a judgment notwithstanding the verdict for the Hawkins County School Board. We also affirm the district court's grant of a directed verdict in favor of the City of Church Hill and the jury's verdicts in favor of defendants Ashbrook, Price and Snodgrass.

I.

On November 20, 1984, pursuant to 42 U.S.C. Section 1983, plaintiff Vicki Frost, a parent with three children in the Hawkins County School System, sued the Hawkins County Board of Education ("the Board"); Bill Snodgrass, Superintendent of Hawkins County Schools; Jean Price, Principal of Church Hill Elementary School; Joe Ashbrook, Chief of Police for Church Hill, Tennessee; and the City of Church Hill, an incorporated municipality. In her suit, Frost alleged violations of her constitutional rights under the first and fourteenth amendments.

To a large extent, the instant case arises out of the same factual circumstances as *Mozert* v. *Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988). The controversy in both cases began in September 1983, when a group of "born-again" Christian parents expressed their disapproval of a new series of Holt, Rinehart & Winston reading books.[1] These [851 F.2d 824] parents objected

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[1] Pursuant to Tenn. Code Ann. § 49-6-2207 (1983) ("T.C.A."), the books were approved by Tennessee's textbook commission and selected by a committee of Hawkins County teachers for use in grades kindergarten through eight. In relevant part, the statute

to the books because they considered the values which the books seem to endorse (i.e., secular humanism, evolution, and non-Christian religions) to be repugnant to their beliefs. To inform the School Board and the general public of their views, the parents joined to form an organization called Citizens Organized for Better Schools. Frost was particularly active in this organization, giving interviews to several newspaper, television and radio reporters in addition to speaking at meetings of the Hawkins County Board of Education.

In an effort to accommodate offended parents, the School Board allowed Church Hill Middle School students who were offended by the new textbooks to be taught from an older reading series. Two of Frost's three children attended the Middle School and were given reading lessons from the older books.

Frost's third child, Sarah, a second grade student at Church Hill Elementary School, was unaffected by the Board's com-

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states the following:

> (a) The local boards of education are hereby authorized and required to adopt textbooks to be used in the public schools of their school districts, from the list of textbooks listed for adoption by the state textbook commission, the adoption to be for a period of not less than three (3) years, and not more than five (5) years, in accordance with state contracts.
>
> . . . .
>
> (c)(1) Boards of education shall make their adoption upon recommendations of committees, these committees to be set up by subject matter fields and composed of three (3) or five (5) teachers, or supervisors and teachers, the number depending upon the relative size of the local school system.
>
> (2) These committees shall be composed of teachers and supervisors who are now teaching or supervising the respective subject and shall be by grade or groups of grades arranged so that a committee may consider an entire series of books if it should so desire, provided in all cases, that the teachers appointed on the committees herein provided for shall hold professional certificates and shall have had three (3) or more years of experience as teachers or supervisors in the public schools.

promise. Thus, Frost sought permission from Church Hill Elementary school principal, Jean Price, to allow Frost to teach Sarah reading. After learning that Frost wanted to give Sarah her lesson while Sarah's classmates were being taught how to read by their regular teacher, Price told Frost that oral reading and comprehension were graded separately and that Sarah would receive a failing grade in oral reading if she did not read from the approved textbook. She also told Frost that Sarah's repeated absences from reading class would be reported to the Hawkins County attendance supervisor. Despite these warnings, each day Frost would go to Sarah's school, remove her from her classroom before the regular reading lesson began, take her to the school's library or cafeteria and give her a reading lesson from an older reading textbook. At the end of the lesson, Frost would take Sarah back to her classroom for instruction in the other subjects.

The Board countenanced both Frost's teaching of Sarah and the use of older reading textbooks to teach some students in the Church Hill Middle School until November 10, 1983, when the Board passed a resolution requiring all students in Hawkins County to use only those textbooks which were currently approved by the Board. As a result of the resolution, it became clear that the Board would no longer compromise with parents who objected to the use of the Board-approved textbooks. Consequently, seven families—14 parents and 17 school children—brought suit on December 3, 1987, to challenge the resolution. They sought injunctive relief and money damages for alleged violation of their first amendment right to freely exercise their religion. The case, to which Frost was a party, was *Mozert*, 827 F.2d 1058. Although the plaintiffs won in district court, a panel of this court reversed and held that the requirement that public school students study a basic reader series chosen by school authorities did not create an unconstitutional burden under the free exercise clause. Thereafter, the Supreme Court denied the plaintiffs' petition for certiorari.

With regard to the instant action, following the November 10, 1983 resolution, Price told Frost that her daily practice of

taking Sarah from reading class was not only unwise but in violation of Board policy. Having stated this, Price refused to continue to let Frost use the school's facilities or grounds to teach Sarah. Rather than discontinuing her lessons, however, Frost took Sarah to the school's parking lot and attempted to give Sarah her reading lesson in the family car. Price consulted with Bill Snodgrass, the Superintendent of Schools, on whether Frost's conduct violated the Board's policy. Snodgrass told Price to call the police and get them to stop Frost's practice of removing Sarah from class to teach her how to read. On November 22, 1983, Church Hill Police Chief Joe Ashbrook came to the school at Price's request [851 F.2d 825] and asked Frost to leave. She left and Sarah rejoined her class.

The next day, November 23, 1983, following the advice of counsel, Frost attempted to resume her practive of removing Sarah from class. However, when she arrived at Sarah's school, Price again stopped her. Price restated the Board's policy and a sharp dispute ensued. This time Frost called the police. Again, Police Chief Ashbrook came to the school. After some discussion, Chief Ashbrook read Frost the Tennessee code section regarding persons improperly on school premises (Tenn. Code Ann. Section 49-818 ("T.C.A."), recodified as T.C.A. Section 49-6-2008 (1983)).[2] He then told Frost that, pursuant to that code section, she had a right to be on school premises only so long as she had lawful and valid business. He told her that since

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[2] T.C.A. 49-6-2008 (1983), Persons improperly on school premises, provides as follows:—(1) In order to maintain the conditions and atmosphere suitable for learning, no person shall enter onto the grounds or into the buildings of public schools during the hours of student instruction except students assigned to that school, the staff of the school, parents of students, and other persons with lawful and valid business on the school premises.

(b) Any person improperly on the premises of a school shall depart on the request of the school principal or other authorized person.

(c) Violation of this section shall be a misdemeanor and punished as such. [Acts 1981, ch. 386, § 1; T.C.A. § 49-818.]

the school's principal had told her that she no longer had valid business on the premises, she would have to leave. When Frost refused, Chief Ashbrook arrested her and took her to jail. After conferring with a General Sessions Court Judge and the District Attorney General, Chief Ashbrook executed an affidavit of complaint charging Frost with violations of T.C.A. § 49-818, and another code section, T.C.A. § 39-3-1204,[3] regarding trespass on school grounds. Frost remained in jail for about three hours.

Frost's arrest received widespread local and some national media attention. Upon her release from jail she gave several press interviews. On December 14, 1983, she removed Sarah and her other children from the Hawkins County Schools and placed them in a private Christian school (where they were in attendance at the time of this appeal).

On November 20, 1984, almost a year after her arrest, Frost filed the instant suit. In her complaint, Frost alleged that defendants restrained the expression of her ideas on the advisability of using the new reading texts, denied her the physical custody of her daughter without due process, sup-

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[3] T.C.A. 39-3-1204 (1983), Trespass on campus, buildings or facilities of school or university, provides as follows:—(a) Any person who enters the campus, buildings, or facilities of a junior college, state university, or public school and is committing, or commits, any act which interferes with, or tends to interfere with, the normal, orderly, peaceful, or efficient conduct of the activities of such campus or facility may be directed by the chief administrative officer, or employee designated by him to maintain order on such campus or facility, to leave such campus, buildings, or facilities.

(b) If such person fails to do so, he shall be guilty of trespass, and upon conviction shall be deemed guilty of, and punished as for, a misdemeanor as provided in § 39-1202. [Acts 1969, ch. 257, § 1; T.C.A., § 39-1215.]

In *Baxter* v. *Ellington*, 318 F. Supp. 1079 (E.D. Tenn. 1970), the court held that T.C.A. 39-3-1204 was invalid because its language was vague and overbroad.

pressed her right to speak symbolically, falsely arrested her, falsely imprisoned her and maliciously prosecuted her. She sought compensatory damages, punitive damages and consequential damages of $100,000 against each defendant, and asked that the Board be enjoined from depriving her of custody of her children, from seeking to have her arrested while on school premises, and from conspiring and assisting in attempts to impose prior restraint on expression of her criticism of the Board and its policies. In essence, Frost claimed she was denied her first and fourteenth amendment rights. Defendants Hawkins County Board of Education and the City of Church Hill denied all liability, and the individual defendants claimed good faith immunity.

Frost set out her claims in pre-trial order entered July 12, 1985. On July 24, 1985, she requested to amend the order to add claims for libel, slander, and def[851 F.2d 826]amation. The district court correctly declined to exercise pendent jurisdiction over those state claims because Frost delayed in asserting them and because the district court believed that their inclusion would confuse the jury and unnecessarily complicate and prolong the action.

At various other times, Frost tried to amend the pre-trial order, move for a continuance or for a mistrial. All attempts failed and the case went to trial. When the evidence was completed, the court directed a verdict for the City of Church Hill and dismissed the punitive damages claim against the Board. At that time, Frost's final motion for mistrial before the district court was denied. The remaining defendants were the Board, Snodgrass, Ashbrook and Price.

The jury received the case on March 27, 1985. It returned a verdict that Frost's civil rights were violated and that she was entitled to punitive damages of $10,000 against Snodgrass and $10,000 against Price. The jury also found that Frost was entitled to $50,000 in compensatory damages from the Board. The court then told the jury that its verdict was inconsistent since punitive damages could not be awarded against a defend-

ant without first awarding compensatory damages. After further deliberation, the jury awarded $70,000 in compensatory damages against the Board alone. This became the district court's judgment.

The Board then sought a judgment notwithstanding the verdict, a new trial, or a remittitur. Frost, for her part, filed several post-trial motions seeking an additur, injunctive relief, judgments notwithstanding the verdicts and/or new trials as to defendants Price, Ashbrook and Snodgrass. She also sought a new trial against the City of Church Hill.

These motions, which the trial court denied, are now the issues on appeal.

II.

In evaluating whether the district court erred in denying the Board's motion for judgment notwithstanding the verdict and whether the district court properly directed the verdict in favor of the City of Church Hill, our standard of review is whether there was sufficient evidence to raise a material question of fact for the jury. *O'Neill* v. *Kiledjian* 511 F.2d 511, 513 (6th Cir. 1975). This determination is one of law to be made by the trial court initially. *Id.*

> In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

Morelock v. *NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (citations omitted). As an appellate court we apply the same standard. *Id.*

III.

The dispositive issue in this case, as in any section 1983 case, is whether Frost was deprived of any federal right. In assessing this, we look to section 1983, on which all of plaintiff's claims are based. Section 1983, in relevant part, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

We think Frost's claims that she was deprived of her freedom to express her opposition to the Board's policy and that [851 F.2d 827] she was deprived of the custody of her child without due process are without merit. There is no evidence that the Board prevented Frost from voicing her opposition to the Board's policy at School Board meetings, or to the media or to whomsoever Frost pleased. For example, Frost was never ejected or barred from Board meetings, and the Board never retaliated against her for her outspoken criticisms of it. Frost's claim that she was deprived of the custody of her child without due process is equally unsupported. Frost had been given notice on November 22, 1983, that she would no longer be permitted to remove Sarah from the regular reading class. Despite this knowledge, and her unencumbered freedom to transfer Sarah to a private school (an option which Frost exercised on December 14, 1983), Frost chose to send her daughter back to Church Hill Elementary School and renew her disruption of the school's normal routine. For these reasons, we hold that the district court erred in refusing to grant the Board's motion for judgment notwithstanding the verdict. We come to this conclusion after viewing the evidence in the light most favorable to Frost, and giving her the benefit of all reasonable

inferences. The evidence, nevertheless, points so strongly in favor of the Board that we think reasonable minds could not come to a different conclusion.

Pursuant to the same standard of review, we evaluate the district court's directed verdict in favor of the City. The basis of Frost's claims against the City is that Ashbrook arrested Frost without probable cause. The jury decided that Ashbrook, by arresting Frost, did not violate Frost's constitutional rights, thereby implicitly suggesting that Ashbrook had probable cause to arrest Frost. Since a jury's findings that a police officer inflicted no constitutional injury on a plaintiff is conclusive not only as to the officer's liability, but also as to the liability of the city and its police commission. *City of Los Angeles* v. *Heller*, 475 U.S. 796, 106 S.Ct. 1571, 1573 (1986), we affirm the district court's directed verdict in favor of the City of Church Hill. While Frost may have a state claim against Ashbrook based on her arrest, this is a question of state law and we express no opinion as to its validity.

Finally, we address Frost's claims against defendants Ashbrook, Price and Snodgrass. Frost sues these defendants in both their official and personal capacities.[4] In *Brandon* v. *Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 878 (1985), the Court notes that official capacity claims are essentially claims against the entity itself. Thus, our basis for rejecting Frost's claims against the Board and the City—i.e., because Frost suffered no constitutional deprivation—also forms the basis of our rejection of Frost's claims against Ashbrook, Price and Snodgrass in their official capacities. *See e.g.*, *Monroe* v. *Pape*, 365 U.S. 167 (1961). Similarly, we find that Frost's personal capacity claims against these defendants fail because Frost suffered no constitutional deprivation. Accordingly, we do not disturb the jury's verdicts as to these defendants.

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[4] Personal capacity actions (which are sometimes referred to as individual-capacity actions) and official capacity actions are both permissible under section 1983. *Kentucky* v. *Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985).

IV.

Since we have decided that Frost suffered no constitutional deprivation, her claims under section 1983 cannot succeed. However, even if Frost had suffered a constitutional deprivation, her section 1983 claim against the City, the Board and defendants in their official capacities would, nevertheless, fail because the alleged deprivations were not proximately caused by a custom or policy of the City or the Board. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Under *Monell*, local government entites, such as municipalities and school boards, are liable for civil rights violations if those violations result from the implementation of their official policy or are due to a [851 F.2d 828] governmental "custom." Municipal liability can be found for constitutional deprivations due to governmental "custom" even though that custom has not received formal approval through the government's official decision-making channels.[5] *Monell*, 436 U.S. at 690-91. In the instant case, we find no evidence of an offensive custom. Accordingly, in order for Frost to recover on her claim, her supposed constitutional deprivation must have been proximately caused by an official policy of either the City or the Board.

The Supreme Court has defined policy. In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480-81 (1986), the Court said official policy "often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." Most recently in

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[5] As Mr. Justice Harlan, writing for the Court, said in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

City of St. Louis v. *Praprotnik*, 108 S. Ct. 915 (1988), the Court revisited this issue and in restating *Pembaur's* guiding principles stated:

> First, a majority of the Court [in *Pembaur*] agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." Second, only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. Third, whether a particular official has "final policymaking authority" is a question of *state law*. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business.

Praprotnik, 108 S. Ct. at 924 (citations omitted) (emphasis in original).

In light of these principles, we evaluate the only relevant policy in the record (with regard to the Board) i.e., the Board's November 10, 1983 resolution which required all Hawkins County students to use only those textbooks which the Board had currently approved. A review of the Board's policy along with a review of the way it was promulgated and implemented, reveals no evidence that this policy was a proximate cause of any of Frost's claimed deprivations. Additionally, we think the Board's policy was in pursuance of a legitimate Board interest: the uniform instruction of Hawkins County's 8,000 students. And of course, this very policy was upheld against constitutional attack in *Mozert*.

With regard to Frost's claim against the City, even if Frost's arrest had constituted a constitutional deprivation, we would not hold the violation to be pursuant to an official policy of the City. While we recognize that the Court in *Pembaur* held that municipal liability can be established on the basis of a single decision of one of its employees, we do not think that this is the case here. As the *Pembaur* court stated:

> Municipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with

> respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

Pembaur, 106 S.Ct. at 1299 (footnotes omitted). Because there is no evidence that Ashbrook possessed any final authority to establish municipal policy, Frost fails to meet this standard. The record establishes that in the City of Church Hill only the Mayor and the Board of Aldermen could determine Police Department policy. In fact, an examination of the trial testimony of the Mayor and the City Clerk, as well as the City's official minutes, makes it very [851 F.2d 829] difficult to see how the City participated in the incident that precipitated this lawsuit.

As for Frost's personal capacity suits against Ashbrook, Price and Snodgrass, we believe that even if a federal right had been violated, defendants would have had available to them the defense of qualified immunity.[6] In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that, in general, executive officials are entitled to qualified or good-faith immunity so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. *Id.* at 815-19. Neither Snodgrass nor Price, by enforcing Board policy, nor Ashbrook, by arresting Frost, violated any clearly established statutory or constitutional right of which a reasonable person should have known. *See Harlow*, 457 U.S. at 815.

For the above stated reasons, we AFFIRM the district court's grant of a directed verdict in favor of the City of Church Hill, REVERSE the district court's judgment against the Board and grant a judgment notwithstanding the verdict in favor of the Board. Because the nonexistence of a federal

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[6] To defeat official capacity claims, the defenses available are only those "immunities [which] . . . are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Kentucky* v. *Graham*, 473 U.S. at 167.

violation is dispositive of the issues before the court, we find it unnecessary to discuss Frost's post-trial motions for additur, injunctive relief, and a new trial as to defendant's Price, Ashbrook, Snodgrass and the City of Church Hill.

United States District Court
Eastern District Of Tennessee

Case Number: CIV-2-84-453

VICKIE FROST,

Plaintiff,

v.

JEAN PRICE, JOE ASHBROOK,
HAWKINS COUNTY BOARD OF EDUCATION
BILL B. SNODGRASS,

Defendants.

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to a trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff Vickie Frost's constitutional rights were violated, and award the plaintiff Vickie Frost compensatory damages in the amount of seventy thousand dollars ($70,000.00) and tax these damages against the defendant Hawkins County Board of Education.

March 27, 1986
Date

KARL D. SAULPAW, JR.
Clerk
/s/DIXIE J. BLAKE
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CIV-2-84-453

VICKIE FROST,

v.

BILL SNODGRASS, JEAN PRICE,
HAWKINS COUNTY BOARD OF EDUCATION,
and JOE ASHBROOK,

FILED March 27, 1988

VERDICT FORM

We, the jury, unanimously find as follows:

1. Vickie Frost's constitutional rights were violated.

[If you answered "were not," skip the rest of the questions but sign the verdict form.]

2. We fix plaintiff Frost's compensatory damages at $70,000.00 and tax these damages against the following defendants: Hawkins County Board of Education

3. This _____ an appropriate case for an award of punitive damages.

[If you answered "is not" to question 3, skip the next question but sign the verdict form.]

4. We hold the following defendants liable for punitive damages in the amounts indicated:

name of defendant	amount of liability

[Remember that only individual defendants—not the Board of Educatioon—may be held liable for punitive damages. Also you may not award punitive damages against an individual unless you also held him liable for compensatory damages in question 2.]

/s/RICHARD EARLY
Foreperson

DATE 3-27-86

First Amendment to the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution

> . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Tennessee Code Annotated 49-6-2008

> Persons improperly on school premises.—(a) In order to maintain the conditions and atmosphere suitable for learning, no person shall enter onto the grounds or into the buildings of public schools during the hours of student instruction except students assigned to that school, the staff of the school, parents of students, and other persons with lawful and valid business on the school premises.
>
> (b) Any person improperly on the premises of a school shall depart on the request of the school principal or other authorized person.
>
> (c) Violation of this section shall be a misdemeanor and punished as such. [Acts 1981, ch. 368, § 1; T.C.A., § 49-818.]

Tennessee Code Annotated 39-3-1204

Trespass on campus, buildings or facilities of school or university.—(a) Any person who enters the campus, buildings, or facilities of a junior college, state university, or public school and is committing, or commits, any act which interferes with, or tends to interfere with, the normal, orderly, peaceful, or efficient conduct of the activities of such campus or facility may be directed by the chief administrative officer, or employee designated by him to maintain order on such campus of facility, to leave such campus, buildings, or facilities.

(b) If such person fails to do so, he shall be guilty of trespass, and upon conviction shall be deemed guilty of, and punished as for, a misdemeanor as provided in § 39-1-202. [Acts 1969, ch. 257, § 1; T.C.A., § 39-1215.]

Supreme Court, U.S.
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No. 88-604

In The
Supreme Court of the United States
October Term, 1988

VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAWKINS COUNTY BOARD OF EDUCATION IN OPPOSITION

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAWKINS COUNTY BOARD OF EDUCATION IN OPPOSITION

Respondent Hawkins County Board of Education respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, which is reported at 851 F.2d 822.

STATEMENT OF THE CASE

Petitioner's statement of the facts is inaccurate, misleading and deals with matters not relevant to this case, necessitating a restatement of the pertinent facts considered below.

This is a civil rights action based on 42 U.S.C. § 1983 in which Vicki Frost alleged violations of her First Amendment free speech rights and her Fourteenth Amendment rights. She claimed prior restraint on expression of her ideas on the advisability of using new reading textbooks in the Hawkins County public schools, denial of physical custody of her daughter without due process, false arrest and imprisonment and malicious prosecution. She sued the Hawkins County Board of Education; Bill Snodgrass, Superintendent of Schools; Jean Price, Principal of Church Hill Elementary School; Joe Ashbrook, Chief of Police for Church Hill, Tennessee and the City of Church Hill. Although she objected to the textbooks on religious grounds, she did not claim interference with her right to the free exercise of religion as guaranteed by the First Amendment. (2nd Amended Complaint, R.12; Pretrial Order R.24).[1]

Mrs. Frost did, however, join other parents and children in a different suit against the Hawkins County public schools and school officials (including Jean Price and Bill Snodgrass) asserting that exposure of the plaintiff-students to objectionable material in the reading books violated their constitutional right to freely exercise their re-

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[1] "R" references are to docket entry numbers in the District Court Record and "TR" references are to pages of the trial transcript.

ligion. They sought damages, exemption from using the books and alternative reading instruction. Petitioner and the other plaintiffs prevailed in the trial court, but the Sixth Circuit Court of Appeals reversed and dismissed. This Court declined to hear the case. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986) *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988).

When the 1983 school year began there was a new series of coordinated reading books published by Holt, Rinehart and Winston ("the Holt readers") to be used for grades K-8 of the Hawkins County, Tennessee school system. The series was approved by the State Department of Education, selected by a committee of Hawkins County teachers from among several competing series and approved by the Hawkins County Board of Education ("the Board").

Mrs. Frost had three children enrolled in the school system, two in middle school and a daughter, Sarah, in the second grade at the Church Hill Elementary School. Mrs. Frost became concerned about materials in the Holt readers and concluded that she objected to the complete series because it contained stories dealing with themes which she considered repugnant to her religious beliefs: e.g. secular humanism, situation ethics, mental telepathy, evolution, non-Christian religions, feminism, inappropriate roles for the sexes, disobedience to parents and pacifism. (TR C-11, 13, 14, 48). Petitioner determined to make the public aware of her objections to the textbooks. She helped organize and was active in an organization known as Citizens Organized for Better Schools, which objected

to the textbooks. She voiced her objections to the textbooks at open meetings of the Board and spoke to the news media about her concerns. (TR B-26, 27, 32, 33, 35).

Petitioner's children, and those of other similarly concerned parents, at the Church Hill Middle School were allowed for a while to use an older reading series, rather than the Holt readers. That arrangement continued until the Board passed a resolution on November 10, 1983 requiring all students to use only those textbooks approved by the Board. Petitioner refused to allow her children at the Middle School to participate in class where the objectionable books were in use and they were suspended twice for refusing to participate in reading class. (TR A-19, 20).

Mrs. Frost complained about Sarah's textbook at the elementary school and her teacher and Mrs. Price, the Principal, agreed as a temporary measure to excuse Sarah from reading the book. Mrs. Frost talked with Mrs. Price on several occasions and explained in detail her objections not only to Sarah's book but the other books in the series. Mrs. Price attempted to determine which stories in the second grade book were acceptable to Petitioner and all stories seemed to have something wrong with them. (TR C-16). Mrs. Price explained that oral reading and comprehension were graded separately and that Sarah would receive a failing grade in oral reading, if she did not read the approved textbook.

Mrs. Frost informed Mrs. Price that she had determined to remove Sarah from class during the reading period. She requested to be allowed to take Sarah to the library or cafeteria and work with her during reading

class. Mrs. Price, who felt that was against Board policy and unwise, disallowed the request. (TR F-44, 45). Mrs. Price explained that Petitioner had the right to take Sarah out of class and that Sarah would not be expelled or suspended if taken from class by her mother. However, Mrs. Price informed Petitioner that repeated absences from class would be reported to the County's attendance supervisor. (TR C-22).

On Monday, November 21, Petitioner came to the school to remove Sarah from class. While there she met with Mrs. Price, a member of the Board, the elementary supervisor for the school system and Sarah's teacher. After a short discussion Mrs. Frost removed Sarah from class and took her from the school grounds without objection or hindrance. (TR A-34, C-27). Sarah later returned to class and completed the day without incident.

The next day Petitioner returned to the school, talked with Mrs. Price about the requirement that Sarah use the approved text and participate in oral reading. Petitioner again requested to take Sarah to the library or cafeteria to work with her during the reading class and that request was denied. Mrs. Frost then took Sarah from the reading class and sat with her in an automobile in the school parking lot. Mrs. Price felt that conduct violated Board policy and consulted the School Superintendent who suggested that she have the local police ask Mrs. Frost to leave the parking lot. (TR C-27, 32). Mrs. Price contacted the local police department and police chief Joe Ashbrook responded. She explained the situation to him, he asked Petitioner to leave and she did. Petitioner later dropped Sarah off at the school and she returned to class. (TR C-32, 36, 48).

On November 23, 1983 Petitioner returned to the school and was again told by Mrs. Price that she had the right to take Sarah from class, but that she would not be permitted to take Sarah anywhere on the premises to instruct her in reading. (TR F-38). Mrs. Frost then called the Church Hill Police Department and asked that a police officer be sent to the school. (TR A-52). She stated she was going to get Sarah out of reading class and left. (TR A-53). Mrs. Price made no objection. (TR F-38). Mrs. Frost returned without Sarah and stated that reading had not begun. (TR A-53). Shortly thereafter policeman Ashbrook arrived.

After Ashbrook arrived Mrs. Frost presented Mrs. Price with two letters indicating that she was taking Sarah out of the Holt basic reading program because of dictates of conscience and requesting to sit in the lunch room with her acting as an aide to the teacher until reading class was completed. (TR A-55, F-39). An argument ensued about the contents of the letter and Petitioner's position on the use of the textbooks. Mrs. Frost stated that she wasn't going to check Sarah out and that she was not going to leave and stated several times that Mrs. Price would have to have the policeman arrest her. TR F-39, 40; TR VII-69, 109). Mrs. Price tried to explain to Petitioner why it was not permissible or feasible to have her take Sarah out of the classroom and go to the cafeteria or elsewhere in the school to teach reading. (TR F-40).

Ashbrook asked Mrs. Price for a copy of the statute concerning people improperly on school premises. (T.C.A. § 49-818) TR F-40). Mrs. Price had located the stat-

ute in a volume of the Tennessee Code dealing with the school administration, which she maintained in her office, because she feared that a disruptive situation might develop and she wanted to know what her rights as a principal were. (TR F-80, 81). She had previously discussed the provisions of the statute with Mrs. Frost, (TR C-48), and had mentioned the statute to Officer Ashbrook when he had been at the school the day before. (TR F-49). When Petitioner heard the statute mentioned she protested that she had a right to be on school property and that she was not breaking the law. (TR A-57). Mrs. Price explained that she did have a right as a parent to be there as long as she had lawful and valid business, but that she no longer had valid business and that she must leave. Mrs. Frost refused to leave. (TR F-40, 41).

Officer Ashbrook then read T.C.A. § 49-818 to Mrs. Frost and asked her to leave. When she refused to leave, she was placed under arrest, (TR F-41), and taken to the county jail, where she was processed and placed in a cell. She remained in jail for about two hours and was released on her own recognizance.

Petitioner was charged with violation of two Tennessee statutes dealing with persons on school premises (18a and 19a).[2] At a preliminary hearing both charges were dismissed. No one connected with the school system testified at the preliminary hearing. (R.86). No one connected with the school system urged the District Attorney or his assistant to prosecute the case in any particular

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[2] References to pages followed by "a" are to the Appendix to the Petition for Certiorari.

manner or had any contact with the Judge about how the case should be handled. (TR D-79, E-22, 23).

On December 14, 1983, Petitioner enrolled all her children in a private, church affiliated school and she has not attempted to re-enroll them in the Hawkins County school system.

The Pretrial Order filed July 12, 1985, delineated Petitioner's claim:

> II. *GENERAL NATURE OF THE CLAIMS OF THE PARTIES:* (a) The plaintiff, Vickie Frost, alleges . . . the defendants, acting under color of law, did knowingly and willfully conspire with each other, and others, and did aid and assist each other for the purpose of imposing a prior restraint upon plaintiff, through a policy of using the City's police department to threaten and intimidate plaintiff, and others similarly situated, to prevent her from expressing in a lawful, but effective, time, place and manner, ideas relative to the advisability and wisdom of using certain textbooks . . . to teach public school, thereby, depriving her of her First Amendment right of freedom of speech. . . .
>
> The plaintiff also alleges that the defendants deprived her of life, liberty and/or property without due process of law in violation of the Fourteenth Amendment. . . . More specifically, plaintiff claims (1) that . . . the defendants Board of Education, Price, and Snodgrass, through implementation of the Board's official policy, did knowingly deprive plaintiff of the physical custody of her child, Sarah, without due process of law, . . . (2) that on November 23, 1983, the defendants Ashbrook, City of Church Hill, and Price, did knowingly deprive plaintiff of her liberty without due process of law when they arrested her (or caused her to be arrested) without probable cause . . . (3) that on November 23, 1983, defendants Ashbrook and City of Church

> Hill did knowingly deprive plaintiff of her liberty without due process of law when they imprisoned her, or caused her to be incarcerated, . . . and (4) that defendants Ashbrook and the City of Church Hill did knowingly deprive plaintiff of liberty without due process of law when they falsely charged plaintiff with violating specified laws of the State of Tennessee. . . .
>
> Plaintiff seeks the following relief: (1) compensatory and consequential damages . . . (2) punitive and exemplary damages . . . (3) costs and attorneys' fees; and (4) an injunction, enjoining the defendant Board from depriving plaintiff from the custody of her children when she requests such custody in order to prevent the school from teaching her child through the use of materials which violate their religious convictions, enjoining defendants from arresting plaintiff and/or from seeking to have plaintiff arrested when she is present on the school premises as a parent of a child enrolled in the school, and enjoining defendants from conspiring and assisting attempts to impose prior restraint on plaintiff's (or those similarly situated) lawful expression of criticism of the Board and its policies. (R.24).

Mrs. Frost sought no relief for alleged violation of her First Amendment right to free exercise of religion. She sought no injunction requiring an alternative to the Holt readers for her children.

The jury was not charged on the Free Exercise Clause of the First Amendment. The trial court summarized plaintiff's claims as follows:

> She claims, first, that they violated her First Amendment right of free speech and expression by preventing her from removing Sarah from reading classes, and that this act on their part was, in effect, a prior restraint on her free expression of her ideas. She

> claims further that on November 23rd, 1983, they deprived her of her liberty interest in having physical custody of Sarah, without due process of the law, and that they caused her to be arrested, imprisoned, and prosecuted without probable cause, also a violation of her Fourteenth Amendment right to due process of law. (TR IX-82).

Petitioner sought no jury charge dealing with the Free Exercise Clause of the First Amendment of the United States Constitution, and on appeal her counsel admitted she sought no such relief:

> In the *Mozert* case, Frost was compensated for violation of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights. . . . The damages in this case were awarded for deprivation of the constitutional rights proven in this case, without regard to violation of First Amendment rights to free exercise of religion. (Brief of Vicki Frost as Appellee to Hawkins County Board of Education Appeal, and Reply to Appellee's Briefs, U.S. Ct. App., 6th Cir., No. 86-5680/5706, pp. 28, 29).

The District Court dismissed the City of Church Hill and the punitive damage claim against the Board. The jury exonerated Police Chief Ashbrook, Principal Price and Superintendent Snodgrass and returned a verdict of $70,000 against the Board. On appeal the Court of Appeals granted a judgment notwithstanding the verdict in favor of the Board and affirmed dismissal of all other parties. (13a, 14a).

The Court of Appeals found that no evidence was presented from which a reasonable person could find that plaintiff's constitutional rights were violated by the Board of Education. (10a). It also found that the only relevant

policy in the record with regard to the Board was the November 10, 1983 resolution requiring all Hawkins County students to use only those textbooks which the Board had currently approved; and there was no evidence that policy was a proximate cause of any of Mrs. Frost's claimed deprivations. (12a).

No party briefed the issue of whether Petitioner's right to freely exercise her religion was unconstitutionally infringed upon and the Court of Appeals made no mention of free exercise rights.

———o———

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. QUESTIONS 1, 3 AND 4 PRESENTED IN THE PETITION FOR CERTIORARI DEAL WITH THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND WERE NOT RAISED, PASSED ON, OR PRESERVED IN THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

This case does not present the issues which Petitioner maintains. The case does not involve the Free Exercise Clause of the First Amendment. This Court would of necessity have to render an impermissible advisory opinion should it undertake to answer either questions 1, 3 or 4. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). Each of those questions deals with potential violation of the Free Exercise Clause, which was not dealt with in the trial court or the Court of Appeals. The issues

urged on this Court were not pled, charged to the jury or brought to the Court of Appeals' attention. The questions should not be considered now. *Springfield v. Kibbe,* 480 U.S. 257 (1987); *Adickes v. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970); *California v. Taylor,* 353 U.S. 553, 557, n.2 (1957).

A. Petitioner made no claim below that her free exercise of religion had been impermissibly burdened.

Neither the Complaint, nor the Pretrial Order, contained any indication that Petitioner claimed that her free exercise of religion had been impermissibly burdened.[3] Mrs. Frost alleged violations of her First Amendment free speech rights and her Fourteenth Amendment rights. She claimed prior restraint on expression of her ideas on the advisability of using the Holt readers in the Hawkins County public schools, denial of physical custody of her daughter without due process, false arrest and imprisonment and malicious prosecution. There was no mention whatsoever of the Free Exercise Clause in the pleadings or pretrial order or in any documents filed by Petitioner in an effort to amend the Pretrial Order (R.28, 36).

B. The jury was not instructed on the issue of violation of the Free Exercise Clause of the First Amendment.

The jury in this case could not have decided any questions pertaining to alleged violation of Mrs. Frost's right to freely exercise her religion because it received no in-

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[3] See Statement of the Case, p. 8, *supra* for plaintiff's claims for relief as stated in the Pretrial Order.

structions on that area of the law. Although the trial judge read the entire First Amendment to the jury, it is obvious that he did so only because plaintiff had alleged violation of her free speech rights.[4]

Petitioner sought no jury charge dealing with the Free Exercise clause of the First Amendment of the United States Constitution and made no objection to the trial court's failure to instruct on the Free Exercise Clause.

C. Petitioner did not brief the issue of impermissible burden of free exercise of religion in the Court of Appeals, her counsel stated she sought no relief under the Free Exercise Clause, and she is estopped to raise that issue.

In her brief in the Court of Appeals Petitioner claimed no error in the trial court's failure to charge on the issue of impermissible burden of free exercise of religion; nor did she complain of the trial court's failure to instruct the jury about or otherwise deal with the issues she now raises in questions 1, 3 and 4 in the Petition. The explanation for Mrs. Frost's failure to brief these issues is obvious—she sought no relief based on the Free Exercise Clause. Her counsel stated clearly that she sought no such relief:

> In the *Mozert* case, Frost was compensated for violations of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights. . . . The damages in this case were awarded for deprivation of the constitutional rights proven in this case, without regard to violation of First Amendment rights to free exercise of religion. (Brief of Vicki Frost as Appellee to

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[4] See respondents Statement of the Case, p. 9, *supra*, for pertinent portion of the jury instructions.

Hawkins County Board of Education Appeal, and Reply to Appellee's Briefs, U.S. Ct. App., 6th Cir., No. 86-5680/5706, pp. 28, 29).

Petitioner is bound by the representations of her counsel in the Court of Appeals and is judicially estopped to seek relief based on the First Amendment right to free exercise of religion. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

D. Facts necessary to decide the questions presented were not developed in the trial court.

Even if the Court were inclined to consider questions 1, 3 and 4 presented in the Petition, the record does not contain the necessary facts. There was no effort by either side to develop facts dealing with the sincerity of plaintiff's religious beliefs, whether those beliefs were burdened, whether there was a compelling state interest which justified the burden and whether plaintiff's beliefs could have been accommodated without compromising compelling state interests. Those questions must be answered in a Free Exercise Clause case.

II. THE ISSUES RAISED IN QUESTIONS 1, 3 AND 4 PRESENTED IN THE PETITION FOR CERTIORARI WERE DECIDED AGAINST PETITIONER BY THE COURT OF APPEALS IN ANOTHER ACTION INVOLVING THE SAME PARTIES AS IN THE ACTION NOW BEFORE THIS COURT AND THIS COURT DENIED CERTIORARI.

Petitioner is seeking to have the Court review questions it declined to consider during its last term in a case with the same parties. She wants a "second bite at the apple" to which she is not entitled.

Mrs. Frost and others of like mind litigated the question of whether the Hawkins County Board of Education's policy of requiring all students to use the Holt readers impermissibly burdened their free exercise of religion in *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd* 827 F.2d 1058 (6th Cir. 1978), *cert. denied*, 108 S. Ct. 1029 (1988). Defendants included the Board, Jean Price and Bill Snodgrass, and the factual background was the same as that of the case now before this Court. An eight day trial was devoted to questions of whether plaintiffs' religious beliefs were burdened, the nature of the State's interest in requiring use of the books, what accommodation could and should be made for plaintiffs, etc. The issues Mrs. Frost now asks this Court to consider were thoroughly developed in *Mozert*, where the Court of Appeals reversed a verdict in Mrs. Frost's favor and this Court elected not to review the case.

Question No. 1 in the Petition for Certiorari in the *Mozert* case reads:

> 1. Does coercing children to read textbooks which violate their religious beliefs burden their free exercise of religion?

Questions 1, 3 and 4 in the petition in this case are simply an elaboration on the question posed in the *Mozert* case and are encompassed in it:

> 1. May a public school refuse to exempt a student who, along with parents, raises sincere religious objections to certain required books in a reading class?
>
> 3. May public schools expel children from all aspects of the public school curriculum, and thereby deny a public benefit, if they and their parents object on

sincere religious grounds to one portion of the school curriculum?

4. Do public schools have a constitutional duty to provide reasonable education alternatives to accommodate the sincere religious objections of a few students and parents to specific curricular materials?

The decision in the *Mozert* case conclusively establishes that Mrs. Frost's free exercise rights were not impermissibly burdened. As far as issues 1, 3 and 4 are concerned the parties in this case are identical to those in the *Mozert* case and the decision of the Court of Appeals in that case is final and constitutes *res judicata* on those questions. Petitioner is estopped to raise the issue of violation of her right to free exercise of religion in this case. *Montana v. United States,* 440 U.S. 147 (1979); *United States v. Munsingwear,* 340 U.S. 36 (1950).

III. QUESTION 2 PRESENTED IN THE PETITION FOR CERTIORARI PRESENTS AN ABSTRACT ISSUE DEPENDENT ON ASSUMED FACTS NOT ESTABLISHED IN THE TRIAL COURT.

Petitioner's Question 2[5] is misleading because it assumes facts which are not presented. There is no evidence that a "public school" (presumably Petitioner meant "a school board") had Mrs. Frost arrested. The Court of Appeals found no evidence the Board caused Mrs. Frost to be arrested. There was no evidence of any action by the Board as an entity except the resolution requiring all students to use the Holt readers and that was found not

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[5] 2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from those books?

to be a proximate cause of any deprivation of rights (11a, 12a). The Pretrial Order alleges only Ashbrook, the City of Church Hill and Price arrested Mrs. Frost (or caused her to be arrested).[6]

Even if one assumes there is evidence Mr. Snodgrass or Mrs. Price or Board employees somehow caused Petitioner to be arrested, the Board would not be liable. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). The jury apparently felt Snodgrass and Price were not liable since they were exonerated.

Mrs. Frost was arrested by Church Hill police chief Joe Ashbrook who she called to the school. He had no affiliation with the School Board; and he was also exonerated by the jury.

The essential factual predicate of the question presented—that the School Board had Mrs. Frost arrested and jailed—is missing. Question 2 is therefore merely an abstract or hypothetical question unrelated to the realities of this case and this Court traditionally will not answer such a question.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WHICH PRESENTED NO IMPORTANT QUESTION OF FEDERAL LAW.

This case presents no important unanswered question of federal law. It involved allegations of prior restraint on free speech, false arrest and imprisonment and malicious prosecution; and basically involved a determination of disputed facts. The jury found the facts against Mrs.

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[6] See Statement of the Case, p. 8, *supra*.

Frost as to all defendants except the City of Church Hill and the School Board and there was insufficient evidence to support a verdict against them. The Court of Appeals correctly decided the appeal.

None of the claimed questions of "extraordinary import" which Petitioner accuses the Court of Appeals of ignoring were present in this case. All of those questions involve the Free Exercise Clause which was not pled, proved or even discussed in either the trial court or the Court of Appeals.

———o———

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE RESPONDENT, JOE ASHBROOK, IN OPPOSITION

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HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE RESPONDENT, JOE ASHBROOK, IN OPPOSITION

Respondent Joe Ashbrook presents this brief in support of his request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, as reported in 851 F.2d 822.

STATEMENT OF THE CASE

The issues presented for consideration by this Court are not applicable to this repondent, Joe Ashbrook, with the possible exception of issue number 2 set out below. Issues 1, 3 and 4 were not in the case.

> "2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from these books?"

Without belaboring the question of "nondisruptive mother" or the details of the circumstances which brought about the arrest of Vicki Frost, we would submit the following facts to supplement those in the Petition.

Joe Ashbrook, as the Chief of Police of Church Hill, Tennessee, carried the same duties as the other three officers on the force as to times on patrol during the twenty-four hour day. He was the duty officer in a cruiser on both the 22nd and 23rd of November, 1983, when he first was called to the school by the principal but on the morning of the 23rd was dispatched to the school as a result of a call by Vicki Frost herself.

The "confrontation" on that November morning led to Mrs. Frost's arrest for what Joe Ashbrook, in carrying out his duty as he saw it, felt was a violation of law in his presence. This incident was, of course, the centerpiece about which this case swirled.

ARGUMENT

Joe Ashbrook, the Chief of Police for the City of Church Hill, was sued in his official capacity and individually as he was the arresting officer in this incident. After an extensive trial he was exonerated by a jury verdict with all theories of liability having been charged in the instructions of the Court.

Vicki Frost had alleged, and sought to prove, that there was no probable cause for her arrest in the school principal's office on the morning of 23 November 1983. Joe Ashbrook testified that he felt he was faced with a breach of the peace (TR Vol. VII, p. 109, l. 4) and read to her Tennessee Code Annotated 49-6-2008 (18a[1]). The question of whether or not there was probable cause on the part of Joe Ashbrook to arrest Mrs. Frost was a jury question, and that was the way it was presented by the trial judge.

> " . . . whether or not there's probable cause on the part of Mr. Ashbrook, we'll leave to the jury."
>
> (Judge Thomas Hull, Conference with Attorneys, Vol. VIII, p. 29, l. 14)

The jury responded by its verdict exonerating Joe Ashbrook of any liability to Mrs. Frost.

The Court of Appeals, after review of the record, affirmed the jury's verdict in favor of this Defendant. The Court of Appeals for the Sixth Circuit said this with respect to Ashbrook:

> " . . . The basis of Frost's claims against the City is that Ashbrook arrested Frost without probable cause.

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[1] Reference(s) to a number followed by the letter "a" is to the Appendix to the Petition for Certiorari.

> The jury decided that Ashbrook, by arresting Frost, did not violate Frost's constitutional rights, thereby implicitly suggesting that Ashbrook had probable cause to arrest Frost. Since a jury's findings that a police officer inflicted no constitutional injury on a plaintiff is conclusive not only as to the officer's liability, but also as to the liability of the city and its police commission. . . ." *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 1573 (1986), we affirm the district court's directed verdict in favor of the City of Church Hill. While Frost may have a state claim against Ashbrook based on her arrest, this is a question of state law and we express no opinion as to its validity." 10a

The second question concerning Joe Ashbrook was that of his qualified immunity.

Chief Ashbrook sought the best advice he could get under the circumstances and it was the General Sessions Judge of Hawkins County himself who personally wrote the Affidavit of Complaint which Joe Ashbrook signed. (Petition p. 6, para. 2, l. 6). The same judge after a "full evidentiary hearing" in which the district attorney was the prosecutor in the matter dismissed the charges against Vicki Frost. (Petition p. 7, paras. 2 and 3). We would suggest at this point that the judicial process in the State of Tennessee is not to be faulted in its evident attempts to protect any citizen in the free exercise of his or her rights of free expression.

Regardless of any implications to the contrary in the Petition that Joe Ashbrook should have acted differently or that he should have been knowledgeable of constitutional law (Petition, p. 6, para. 2, l. 8) the issue was squarely presented in the Trial Court with an exoneration of Joe Ashbrook by the jury verdict.

The Court of Appeals surveyed this question of qualified immunity and held as follows:

> "As for Frost's personal capacity suits against Ashbrook, Price and Snodgrass, we believe that even if a federal right had been violated, defendants would have had available to them the defense of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that, in general, executive officials are entitled to qualified or good-faith immunity so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. *Id.* at 815-19. Neither Snodgrass nor Price, by enforcing Board policy, nor Ashbrook by arresting Frost, violated any clearly established statutory or constitutional right of which a reasonable person should have known. *See Harlow*, 457 U.S. at 815." 13a

In the Petition, there is cited the case of *Mozert v. Hawkins County School District*, 647 F.Supp. 1194, (E.D.Tenn. 1986) rev'd 827 F.2d 1058 (6th Cir. 1987) cert. denied 108 S.Ct. 1029 (1988), and it is twice denominated as a "related" case by the Petitioner. (Petition p. 9, note 2 and p. 11, l. 4).

The instant cause is not "related" to the *Mozert* case insofar as this Respondent is concerned. Joe Ashbrook was not a party and was in no way involved with the *Mozert* case. The questions raised and determined in that "textbook" controversy are res judicata and the re-introduction of those issues in this Petition for Certirorari is completely inappropriate.

With the foregoing argument, the Respondent, Joe Ashbrook, would submit that his day(s) in Court have

been met and that he should not be required to answer further the issues in the Petition for Certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-604 (4)

In The

Supreme Court of the United States

October Term, 1988

VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE RESPONDENT CITY OF CHURCH HILL, TENNESSEE IN OPPOSITION

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No. 88-604

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VICKI FROST,

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HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE RESPONDENT CITY OF CHURCH HILL, TENNESSEE IN OPPOSITION

Respondent City of Church Hill presents this brief in support of its request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, as reported in 851 F.2d 822.

STATEMENT OF THE CASE

Because the Petition for a Writ of Certiorari does not delineate the status of Church Hill, Tennessee, other than designating it as a respondent, a capsule statement of facts and the action of the trial court follows:

Church Hill is a municipal corporation in and of the State of Tennessee. The elementary school in which the incidents subject of this suit occurred is located within the municipal boundaries, but the school itself is operated by the Hawkins County Board of Education.

The four-man police force of Church Hill does give law enforcement support to the school. In fact, the only specific direction the City of Church Hill gave its officers pertaining to the school, according to Mayor Housewright, was that available officers be present at the school zones at the beginning and the end of the (school) day (TR Vol. VII, p. 98, l. 19).[1]

The trial and its record is devoid of any evidence that the municipality itself was ever a protagonist or a participant in any action or activity alleged to have violated the rights of Vicki Frost.

At the close of all the proof the District Judge, upon motion, directed a verdict in favor of the City of Church Hill as there was no reason to submit the question of its liability to the jury.

One of the theories of the Plaintiff in the Trial Court was that the action of Joe Ashbrook, the Chief of Police

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[1] The TR reference(s) is to the page and line of the trial transcript.

was acting based upon a policy, practice, custom or procedure established by the municipality. Alternatively, the allegation was that Ashbrook's action was that of a "policy maker" and that with his arrest of Mrs. Frost, his action in an official capacity became the act of the City of Church Hill. *Brandon v. Holt,* 469 U.S. 796 (1985).

The precautionary argument in this brief will then be limited to the particular points met in the trial and how they were dealt with in the Court of Appeals. As a reading will reflect, the issues presented in the Petition are not directed to this respondent nor were they really the subjects addressed in the original lawsuit.

ARGUMENT

The trial court in granting the motion for a directed verdict as to the respondent City of Church Hill was charged with the responsibility to "determine whether there was sufficient evidence presented to raise a material issue of fact for the jury." *O'Neill v. Kiledjian,* 511 F.2d 511, 513 (6th Cir. 1975). Also see *Rockwell International Corp. v. Regional Emergency Medical Services,* 668 F.2d 29 (6th Cir. 1982). In turn, the Court of Appeals reviews the granting of the directed verdict under the same standard used by the trial judge in determining whether or not it was appropriate to grant the motion. *Sawchik v. E. I. Dupont Denemours & Co.,* 783 F.2d 635 (6th Cir. 1986).

Thus, there were two considered decisions that the evidence simply would not support any claim against the City of Church Hill.

The Court of Appeals presented its opinion with full recognition of the decisions of the United States Supreme Court.

First, there was the decision of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), concerning a "custom" or "policy" of a city. The Court of Appeals said:

> "In the instant case, we find no evidence of an offensive custom." (11a).[2]

Next, the Court of Appeals looked at the question of "official policy" and used both the cases of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and the recent case of *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988) as guidelines. This was the Court's finding:

> "The record establishes that in the City of Church Hill only the Mayor and the Board of Aldermen could determine Police Department policy. In fact, an examination of the trial testimony of the Mayor and the City Clerk, as well as the City's official minutes, makes it very [851 F.2d 829] difficult to see how the City participated in the incident that precipitated this lawsuit." (13a).

With no intent to minimize the Petition for Certiorari as it might appear to this respondent, it simply does not raise any issues germane, either to the trial or the appeal of matter with which City of Church Hill was concerned.

It is respectfully suggested that the reading of the Petition itself supports the contention that this municipality is included in name only and it has been fully

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[2] The reference(s) to a page followed by an a is to the Appendix in the Petition for Certiorari.

absolved in the Courts below. There were no issues dealt with by both the Trial and Appellate Courts that were not based upon established precedent once the facts were determined; the exercise of this Court's jurisdiction is not required.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(5)

No. 88-604

In The

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VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BILL SNODGRASS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public school refuse to exempt a student who, along with parents, raises sincere religious objections to certain required books in a reading class?

2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from those books?

3. May public schools expel children from all aspects of the public school curriculum, and thereby deny a public benefit, if they and their parents object on sincere religious grounds to one portion of the school curriculum?

4. Do public schools have a constitutional duty to provide reasonable education alternatives to accommodate the sincere religious objections of a few students and parents to specific curricular materials?

The respondent insists that the issues formulated by the petitioner were not presented for review in the courts below and are not supported in the record.

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STATEMENT OF THE CASE

Petitioner has mischaracterized the factual record developed during the trial of this simple civil rights case in an attempt to persuade the Court to review a false arrest action which was dismissed by the jury as to defendant Superintendent Bill Snodgrass and other individual defendants, and which was subsequently dismissed in its entirety by the Sixth Circuit Court of Appeals in *Frost v. Hawkins County Board of Education, et al.*, 851 F.2d 822 (1988).

Petitioner Vicki Frost, a resident of Hawkins County, Tennessee, and mother of four (4) school age children developed personal objections to certain stories contained in the Holt, Rinehart & Winston reading textbook used by her second grade daughter, Sarah. [Frost, Tr. A – 5][1] Reading textbooks published by Holt, Rinehart & Winston had been adopted by the Hawkins County School Board for use throughout the school system for the 1983 school year. Defendant Bill Snodgrass was the elected Superintendent of the school system.

Petitioner agitated both the School Board, the Church Hill Elementary School, and the Church Hill Middle School in an effort to have the reading series banned for allegedly teaching witchcraft, humanism, and feminism. When her vigorous public relations campaign failed, the petitioner called the police, interfered with the routine of the Church Hill Elementary School, and provoked her

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[1] "Tr." references are to the pages of the trial transcript. The witness' name precedes the transcript designation. "R." designates the docket entry numbers in the District Court Record.

own arrest. After the December dismissal of the misdemeanor charges, she continued to publicize her objections to the Hawkins County School curricula and reading texts. Petitioner went so far as to publicly accuse the school system of sanctioning various explicit sexual misconduct in the hallways of a County high school. [Frost, Tr. B – 86, 87; Mozert, Tr. E – 63, 64, 72]. This case presents an extremely interesting factual situation but does not involve any First Amendment constitutional issues.

The Pretrial Order of July 12, 1985 supplanted the pleadings and set the parameters for developing the record during the trial of the case. [R. 24, ¶ 2(a)]. The delineation of the plaintiff's claims in the pretrial order do not contain any reference to plaintiff's "sincere" religious convictions, deprivations of religious freedom, or any other claims which indicated that the parties were involved in a "First Amendment" civil rights case. The pretrial order and the trial record deal with events leading up to the plaintiff's arrest at the Church Hill Elementary School in November, 1983, and with the damages she allegedly sustained because of all of the publicity surrounding her activities, interviews, and press releases from August, 1983 through December, 1983.

The petitioner has previously framed this case's constitutional issues in her Brief of Appellant, U.S. Ct. App., 6th Cir., No. 86-5690/5706 thusly:

ISSUE TWO

> Did the district court err by refusing to charge the jury as requested on certain civil rights proven to have been violated? [Brief of Appellant, p. 24]

. . .

1. Appellees violated Mrs. Frost's constitutional right to remain in the parking lot of the Church Hill Elementary School with her child where seated in her automobile in a non-restrictive parking lot, peaceable, in broad daylight, not obstructing any traffic and not violating any law. [*Id.* at 25]

. . .

2. Appellees violated Mrs Frost's constitutional right to be free from interference by any human authority with her, or her child's rights of conscience and moral sense or [sic] right and wrong. [*Id.* at 27]

. . .

3. Appellees violated plaintiff's right not to be retaliated against by Appellees under color of state authority for exercising other federally protected rights. [*Id.* at 29]

The omission in the Appellant's Brief of any reference to alleged deprivations of "religious" liberties is certainly understandable in light of the petitioner's testimony during the trial of the case. On September 8, 1983, Vicki Frost, as a representative of COBS (Citizens Organized for Better Schools) presented a petition signed by approximately 250 individuals to the Hawkins County School Board at its monthly public meeting. The petition protested the indoctrination of the school children in the tenets of the Wicca religion. Though the petition equated Wicca with "telepathy", Mrs. Frost admitted at trial that she knew that the term "Wicca" referred to witchcraft. Mrs. Frost testified that she believed witchcraft existed and that certain of its principles were being taught in the Hawkins County Schools. [Frost, Tr. B – 89, 90, 91].

On October 10, 1983, plaintiff Frost sent a letter to her daughter's elementary school teacher setting forth her parental objections to the second grade reader approved by the school board:

> . . . . Mrs. Sandidge, just this weekend did I have the opportunity to examine Sarah's *People Need People* reader. Humanism, distorted realism, self authority, sun worship, occult symbols are found throughout the book. Would you please take Sarah out of the Holt Basic reading and let her read in the Economy reader. I will help her with any outside work to make up any deficiency. Thank you. . . . [Price, Tr. C – 9]

The petitioner and her husband reaffirmed their secular objections to the second grade reader and school curricula in a second letter dated November 21, to elementary school principal, Jean Price:

> . . . . Because of the dictates of conscience, Sarah will be taken out of the reading period by her parents. The Holt Series readers teach child self-rule or authority, overindulgence of the negative emotions, distorted realism, and other concepts which are offensive to the Christian training of our child. We desire to exercise our American constitutional right of freedom of choice, therefore we choose for her not to participate in this reading class. . . . [Price, Tr. C – 24]

Mrs. Frost continued her frontal assault on the Hawkins County School Board in the local press during this time. In September the petitioner cautioned a local newspaper that she could not say anything else about the situation because she was entering into something "controversial" and could not "spill all of her marbles at once." [Frost, Tr. B – 69]. She warned the School Board that: "[T]here will probably be other action on this, I hope

you know." [Frost, Tr. B – 68]. On November 8, 1983, the School Board announced at its public meeting that all students would thereafter receive instruction from the Holt, Rinehart & Winston reading series which had been previously approved by the Board and the school system's textbook committee. The petitioner promptly proclaimed in the newspaper that: "[I]t's just going to be a showdown." [Frost, Tr. B – 70]. In "Letters to the Editor" Mrs. Frost continued to publicly attack the reading texts because they allegedly taught magic, occult symbols, and contained scary artwork. [Exhibit No. 30].

On November 14, 1983, Mrs. Frost advised Principal Price by telephone that Sarah would no longer be allowed to read the second grade textbook and that the principal should consider expelling Sarah from school. When the principal asked Mrs. Frost directly if her religious beliefs were at issue, Mrs. Frost responded that it was "hard" to classify the moral values involved in the textbook controversy as religion. [Price, Tr. C – 15].

During the month of November, Principal Price had numerous conferences with Mrs. Frost in an attempt to resolve Mrs. Frost's objections to the school's reading materials. The principal tried to persuade Mrs. Frost that it was not in her child's best interest to be removed each day from her reading classes. Mrs. Price explained that Sarah's arbitrary absences from class would adversely affect her grades, retard her advancement, and result in truancy problems. The principal repeatedly advised Mrs. Frost that she could remove Sarah from the school premises by signing her out. Mrs. Frost could not teach her child reading on her own terms on the school premises. [Price, Tr. C – 22-27]. On five separate occasions the

principal discussed the Tennessee compulsory attendance laws, the reading requirements, and the provisions of T.C.A. § 49-818 with Mrs. Frost. [Price, Tr. C – 20].

On November 21, the petitioner removed her daughter from her second grade reading class and left the school premises without incident. [Price, Tr. C – 27, 28]. The next day, however, Mrs. Frost insisted on remaining parked in her automobile in the school parking lot while she read to her daughter. The principal called police officer Joe Ashbrook and requested that he ask Mrs. Frost to leave the parking lot. After sending the principal a note by the officer, Mrs. Frost left the school premises with her daughter. No one threatened Mrs. Frost with arrest. [Frost, Tr. A – 40-42]. Later that evening Mrs. Frost telephoned a lawyer for the Concerned Women for America. [Frost, Tr. B – 44].

Early on the morning of November 23 plaintiff went by the Church Hill city offices looking for police officer Ashbrook. She told a city clerk that she expected to be arrested when she went to the elementary school. [Frost, Tr. A – 45-47; Douthat, Tr. VII – 54]. When she arrived at the elementary school, the petitioner demanded that Principal Price allow her to teach Sarah reading in the school cafeteria. The principal and Mrs. Frost again discussed school policy and procedure. Mrs. Frost continued to insist she be allowed to teach Sarah reading in the school cafeteria. Principal Price responded that she could not allow that. Mrs. Frost telephoned for Officer Joe Ashbrook. When he arrived, Mrs. Frost advised him and Principal Price that she would not leave the principal's office without being arrested. [Frost, Tr. A – 51; Price, Tr. C – 39, 40, 50, Exhibit No. 1; Ashbrook, Tr. VII – 106-109].

Officer Ashbrook read the provisions of T.C.A. § 49-818 to the petitioner and asked her to leave the school property since she had finished her business there. When the plaintiff insisted on remaining in the principal's office, she was arrested for violating T.C.A. § 49-818 and was transported to the county jail in Rogersville, Tennessee. Officer Ashbrook refused to allow Mrs. Frost to take her young daughter to jail with her. [Simpson, Tr. VII – 68].

The unconstitutional provisions of T.C.A. § 39-3-1204, regarding trespassing on school grounds, were not a factor in the petitioner's arrest. A citation to that statute was added to the arrest affidavit by the Hawkins County General Sessions Judge on the afternoon of November 23, several hours after the plaintiff had actually been arrested by Officer Ashbrook. [Lawson, Tr. D – 92].

Superintendent Bill Snodgrass learned of the petitioner's arrest later in the day while working at his Rogersville office. [Snodgrass Depo., 70]. Officer Ashbrook had not contacted Superintendent Snodgrass during the events preceding the plaintiff's arrest. [Ashbrook, Tr. VII – 105, 122]. Superintendent Snodgrass did not suggest the petitioner's arrest, did not arrange for it, and did not know of the arrest until after it had occurred. The jury's verdict exonerated Superintendent Snodgrass. [R. 95]. The Sixth Circuit Court of Appeals affirmed the judgment in favor of Superintendent Snodgrass.

ARGUMENT

REASONS FOR DENYING THE WRIT

This false arrest case involves a unique set of facts which do not raise any substantial constitutional issues. Its companion case, *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988), was the vehicle originally selected by the Concerned Women of America to raise the constitutional issues implicit in a parent's "sincere" religious objections to Hawkins County textbooks. Vicki Frost participated in that case as a plaintiff and was the star witness at the trial of the case. The constitutional issues presented to, and rejected by, this Court in the *Mozert* petition for certiorari are set out below. They encompassed the issues which the petitioner insists are important in this case:

Fourteen children were suspended from their public schools, or were otherwise disciplined, for refusing to read textbooks that violate their religious beliefs.

> 1. Does coercing children to read textbooks which violate their religious beliefs burden their free exercise of religion?
>
> 2. Is home instruction, under Tennessee law, for the single subject in dispute, a less restrictive alternative than expulsion of religious objectors from the public schools?
>
> 3. Are damages available under 42 U.S.C. § 1983 to reimburse parents for providing alternative education when their children are wrongfully excluded from the public schools, even when some of the costs are for private religious education?

Petitioner avoided the constitutional religious issues in her appeal to the Sixth Circuit. In fact, the petitioner

explicitly repudiated all First Amendment claims of religious freedom infringement at pages 28 and 29 of her brief in reply to the Hawkins County Board of Education's appeal filed with the Sixth Circuit on March 24, 1987:

> In the *Mozert* case, Frost was compensated for violations of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights.

Petitioner's unequivocal disclaimer of any religious First Amendment issues being involved in her appeal should preclude her successfully asserting them now as a basis for certiorari.

The record developed at the trial of this false arrest case cannot support a review of any issues related to First Amendment rights. Evidence relating to the "sincerity" of religious beliefs, evidence of the reasons for the expulsion of unnamed students who were not involved in this false arrest case, and an examination of valid grounds for "exempting" unnamed students from certain required reading courses were never considered in this case and cannot constitute grounds for review. The record simply does not support the petitioner's claim that important constitutional issues are involved in this case.

The petitioner makes numerous references to *Wisconsin v. Yoder*, 406 U.S. 205 (1972). An examination of *Yoder* substantiates the inappropriateness of the Court's reviewing the present case. In *Yoder*, the Court emphasized that personal and philosophical beliefs were not equivalent to religious beliefs which had to be accommodated by the public school system. *Id.* at 215, 216. The Court analyzed the "quality" of the religious freedom

claims by examining a record which had been purposely developed at trial so that the religious issues could be addressed on appeal. In *Yoder*, the record was replete with testimony regarding the isolation, self-sufficiency, moral staunchness, and industriousness of the Amish community as evidenced by over two hundred years of documented experience. Detailed proof of the Amish lifestyle, accompanied by expert testimony on the effectiveness of the Amish vocational education system, convinced the Court that the Amish religious beliefs and life style were inseparately intertwined and conflicted "sharply" with contemporary secondary public education. *Id.* at 217. On nearly each page of its opinion, the Court specifically referred to the record in order to anchor its analysis of pertinent constitutional principles.

The record in this case is completely devoid of facts which can support an analysis of the issues framed by the petitioner. The petitioner did not introduce any proof of the depth of her alleged religious convictions. The record reveals little more than the petitioner believed witchcraft and secular humanism were being taught in the Hawkins County School System, that selected short stories allegedly taught female dominance, and that petitioner kept the family television set in a closet except on those frequent occasions when she was featured on local television news broadcasts. There is simply no evidence in the record as to whether plaintiff's personal convictions were shared by an organized religious group or whether those beliefs were related to a pattern of daily living in a religious context. As plaintiff's own letters and comments to Principal Price demonstrate, Mrs. Frost's objections to

her daughter's second grade reader were secular and philosophical, not religious, in nature.

The jury heard the evidence and found that none of the individual defendants had violated plaintiff's civil rights. The Sixth Circuit concluded that there was no evidence to support a jury finding that the Hawkins County School Board policy had violated any of plaintiff's civil rights. This Court has repeatedly announced that it will not review a judgment which must turn on an appreciation of the evidence or on inferences to be drawn therefrom. *Houston Oil Co. v. Goodrich,* 245 U.S. 440 (1917); *U.S. v. Johnston,* 268 U.S. 220 (1924); *National Labor Relations Board v. Waterman Steamship Corporation,* 309 U.S. 206 (1939); *General Talking Pictures Corporation v. Western Electric Company,* 304 U.S. 175 (1937).

The petitioner pled and presented a false arrest civil rights case at the district court level. The "constitutional" issues asserted by petitioner today were not raised in either the district court or the court of appeals. They are not supported by the record. Those "issues" should not be allowed to become the basis for a review by writ of certiorari. *Michel v. Louisiana,* 350 U.S. 91 (1955); *Needelman v. U.S.,* 362 U.S. 600 (1959); *Mishkin v. New York,* 383 U.S. 502 (1966); *Gilbert v. California,* 388 U.S. 263 (1967); *Tennessee v. Dunlap,* 426 U.S. 312 (1976); *Miree v. Dekalb County,* 433 U.S. 25 (1977).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-604

In The

Supreme Court of the United States

October Term, 1988

VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT JEAN PRICE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public school refuse to exempt a student who, along with parents, raises sincere religious objections to certain required books in a reading class?

2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from those books?

3. May public schools expel children from all aspects of the public school curriculum, and thereby deny a public benefit, if they and their parents object on sincere religious grounds to one portion of the school curriculum?

4. Do public schools have a constitutional duty to provide reasonable education alternatives to accommodate the sincere religious objections of a few students and parents to specific curricular materials?

The respondent insists that the issues formulated by the petitioner were not presented for review in the courts below and are not supported in the record.

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STATEMENT OF THE CASE

Petitioner has mischaracterized the factual record developed during the trial of this simple civil rights case in an attempt to persuade the Court to review a false arrest action which was dismissed by the jury as to defendant Superintendent Bill Snodgrass and other individual defendants and which was subsequently dismissed in its entirety by the Sixth Circuit Court of Appeals in *Frost v. Hawkins County Board of Education, et al.*, 851 F.2d 822 (1988).

Petitioner Vicki Frost, a resident of Hawkins County, Tennessee, and mother of four (4) school age children developed personal objections to certain stories contained in the Holt, Rinehart & Winston reading textbook used by her second grade daughter, Sarah. [Frost, Tr. A – 5][1] Reading textbooks published by Holt, Rinehart & Winston had been adopted by the Hawkins County School Board for use throughout the school system for the 1983 school year. Defendant Bill Snodgrass was the elected Superintendent of the school system.

Petitioner agitated both the School Board, the Church Hill Elementary School, and the Church Hill Middle School in an effort to have the reading series banned for allegedly teaching witchcraft, humanism, and feminism. When her vigorous public relations campaign failed, the petitioner called the police, interfered with the routine of the Church Hill Elementary School, and provoked her

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[1] "Tr." references are to the pages of the trial transcript. The witness' name precedes the transcript designation. "R." designates the docket entry numbers in the District Court Record.

own arrest. After the December dismissal of the misdemeanor charges, she continued to publicize her objections to the Hawkins County School curricula and reading texts. Petitioner went so far as to publicly accuse the school system of sanctioning various explicit sexual misconduct in the hallways of a County high school. [Frost, Tr. B – 86, 87; Mozert, Tr. E – 63, 64, 72]. This case presents an extremely interesting factual situation but does not involve any First Amendment constitutional issues.

The Pretrial Order of July 12, 1985 supplanted the pleadings and set the parameters for developing the record during the trial of the case. [R. 24, ¶ 2(a)]. The delineation of the plaintiff's claims in the pretrial order do not contain any reference to plaintiff's "sincere" religious convictions, deprivations of religious freedom, or any other claims which indicated that the parties were involved in a "First Amendment" civil rights case. The pretrial order and the trial record deal with events leading up to the plaintiff's arrest at the Church Hill Elementary School in November, 1983, and with the damages she allegedly sustained because of all of the publicity surrounding her activities, interviews, and press releases from August, 1983 through December, 1983.

The petitioner has previously framed this case's constitutional issues in her Brief of Appellant, U.S. Ct. App., 6th Cir., No. 86-5690/5706 thusly:

ISSUE TWO

> Did the district court err by refusing to charge the jury as requested on certain civil rights proven to have been violated? [Brief of Appellant, p. 24]

. . .

1. Appellees violated Mrs. Frost's constitutional right to remain in the parking lot of the Church Hill Elementary School with her child where seated in her automobile in a non-restrictive parking lot, peaceable, in broad daylight, not obstructing any traffic and not violating any law. [*Id.* at 25]

. . .

2. Appellees violated Mrs Frost's constitutional right to be free from interference by any human authority with her, or her child's rights of conscience and moral sense or [sic] right and wrong. [*Id.* at 27]

. . .

3. Appellees violated plaintiff's right not to be retaliated against by Appellees under color of state authority for exercising other federally protected rights. [*Id.* at 29]

The omission in the Appellant's Brief of any reference to alleged deprivations of "religious" liberties is certainly understandable in light of the petitioner's testimony during the trial of the case. On September 8, 1983, Vicki Frost, as a representative of COBS (Citizens Organized for Better Schools) presented a petition signed by approximately 250 individuals to the Hawkins County School Board at its monthly public meeting. The petition protested the indoctrination of the school children in the tenets of the Wicca religion. Though the petition equated Wicca with "telepathy", Mrs. Frost admitted at trial that she knew that the term "Wicca" referred to witchcraft. Mrs. Frost testified that she believed witchcraft existed and that certain of its principles were being taught in the Hawkins County Schools. [Frost, Tr. B – 89, 90, 91].

On October 10, 1983, plaintiff Frost sent a letter to her daughter's elementary school teacher setting forth her parental objections to the second grade reader approved by the school board:

> . . . . Mrs. Sandidge, just this weekend did I have the opportunity to examine Sarah's *People Need People* reader. Humanism, distorted realism, self authority, sun worship, occult symbols are found throughout the book. Would you please take Sarah out of the Holt Basic reading and let her read in the Economy reader. I will help her with any outside work to make up any deficiency. Thank you. . . . [Price, Tr. C – 9]

The petitioner and her husband reaffirmed their secular objections to the second grade reader and school curricula in a second letter dated November 21, to elementary school principal, Jean Price:

> . . . . Because of the dictates of conscience, Sarah will be taken out of the reading period by her parents. The Holt Series readers teach child self-rule or authority, overindulgence of the negative emotions, distorted realism, and other concepts which are offensive to the Christian training of our child. We desire to exercise our American constitutional right of freedom of choice, therefore we choose for her not to participate in this reading class. . . . [Price, Tr. C – 24]

Mrs. Frost continued her frontal assault on the Hawkins County School Board in the local press during this time. In September the petitioner cautioned a local newspaper that she could not say anything else about the situation because she was entering into something "controversial" and could not "spill all of her marbles at once." [Frost, Tr. B – 69]. She warned the School Board that: "[T]here will probably be other action on this, I hope

you know." [Frost, Tr. B – 68]. On November 8, 1983, the School Board announced at its public meeting that all students would thereafter receive instruction from the Holt, Rinehart & Winston reading series which had been previously approved by the Board and the school system's textbook committee. The petitioner promptly proclaimed in the newspaper that: "[I]t's just going to be a showdown." [Frost, Tr. B – 70]. In "Letters to the Editor" Mrs. Frost continued to publicly attack the reading texts because they allegedly taught magic, occult symbols, and contained scary artwork. [Exhibit No. 30].

On November 14, 1983, Mrs. Frost advised Principal Price by telephone that Sarah would no longer be allowed to read the second grade textbook and that the principal should consider expelling Sarah from school. When the principal asked Mrs. Frost directly if her religious beliefs were at issue, Mrs. Frost responded that it was "hard" to classify the moral values involved in the textbook controversy as religion. [Price, Tr. C – 15].

During the month of November, Principal Price had numerous conferences with Mrs. Frost in an attempt to resolve Mrs. Frost's objections to the school's reading materials. The principal tried to persuade Mrs. Frost that it was not in her child's best interest to be removed each day from her reading classes. Mrs. Price explained that Sarah's arbitrary absences from class would adversely affect her grades, retard her advancement, and result in truancy problems. The principal repeatedly advised Mrs. Frost that she could remove Sarah from the school premises by signing her out. Mrs. Frost could not teach her child reading on her own terms on the school premises. [Price, Tr. C – 22-27]. On five separate occasions the

principal discussed the Tennessee compulsory attendance laws, the reading requirements, and the provisions of T.C.A. § 49-818 with Mrs. Frost. [Price, Tr. C – 20].

On November 21, the petitioner removed her daughter from her second grade reading class and left the school premises without incident. [Price, Tr. C – 27, 28]. The next day, however, Mrs. Frost insisted on remaining parked in her automobile in the school parking lot while she read to her daughter. Principal Price consulted school superintendent Bill Snodgrass by telephone with regard to responding to petitioner's violation of school policy. Upon the superintendent's suggestion, the principal called police officer Joe Ashbrook and requested that he ask Mrs. Frost to leave the parking lot. After sending the principal a note by the officer, Mrs. Frost left the school premises with her daughter. No one threatened Mrs. Frost with arrest. [Frost, Tr. A – 40-42]. Later that evening Mrs. Frost telephoned a lawyer for the Concerned Women for America. [Frost, Tr. B – 44].

Early on the morning of November 23 plaintiff went by the Church Hill city offices looking for police officer Ashbrook. She told a city clerk that she expected to be arrested when she went to the elementary school. [Frost, Tr. A – 45-47; Douthat, Tr. VII – 54]. When she arrived at the elementary school, the petitioner demanded that Principal Price allow her to teach Sarah reading in the school cafeteria. The principal and Mrs. Frost again discussed school policy and procedure. Mrs. Frost continued to insist she be allowed to teach Sarah reading in the school cafeteria. Principal Price responded that she could not allow that. Mrs. Frost telephoned for Officer Joe Ashbrook. When he arrived, Mrs. Frost advised him and

Principal Price that she would not leave the principal's office without being arrested. [Frost, Tr. A – 51; Price, Tr. C – 39, 40, 50, Exhibit No. 1; Ashbrook, Tr. VII – 106-109].

Mrs. Price, who maintained copies of Tennessee statutes pertinent to the school system in her office, handed police officer Ashbrook a copy of T.C.A. § 49-818 and advised Mrs. Frost that she should leave the school premises. [Price, Tr. 40]. Officer Ashbrook read the provisions of T.C.A. § 49-818 to the petitioner and also asked her to leave the school property since she had finished her business there. When the plaintiff insisted on remaining in the principal's office, she was arrested for violating T.C.A. § 49-818 and was transported to the county jail in Rogersville, Tennessee. Officer Ashbrook refused to allow Mrs. Frost to take her young daughter to jail with her. [Simpson, Tr. VII – 68].

The unconstitutional provisions of T.C.A. § 39-3-1204, regarding trespassing on school grounds, were not a factor in the petitioner's arrest. A citation to that statute was added to the arrest affidavit by the Hawkins County General Sessions Judge on the afternoon of November 23, several hours after the plaintiff had actually been arrested by Officer Ashbrook. [Lawson, Tr. D – 92].

The jury's verdict exonerated principal Jean Price. The Sixth Circuit Court of Appeals affirmed the judgment in her favor.

ARGUMENT

REASONS FOR DENYING THE WRIT

This false arrest case involves a unique set of facts which do not raise any substantial constitutional issues. Its companion case, *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988), was the vehicle originally selected by the Concerned Women of America to raise the constitutional issues implicit in a parent's "sincere" religious objections to Hawkins County textbooks. Vicki Frost participated in that case as a plaintiff and was the star witness at the trial of the case. The constitutional issues presented to, and rejected by, this Court in the *Mozert* petition for certiorari are set out below. They encompassed the issues which the petitioner insists are important in this case:

Fourteen children were suspended from their public schools, or were otherwise disciplined, for refusing to read textbooks that violate their religious beliefs.

> 1. Does coercing children to read textbooks which violate their religious beliefs burden their free exercise of religion?
>
> 2. Is home instruction, under Tennessee law, for the single subject in dispute, a less restrictive alternative than expulsion of religious objectors from the public schools?
>
> 3. Are damages available under 42 U.S.C. § 1983 to reimburse parents for providing alternative education when their children are wrongfully excluded from the public schools, even when some of the costs are for private religious education?

Petitioner avoided the constitutional religious issues in her appeal to the Sixth Circuit. In fact, the petitioner

explicitly repudiated all First Amendment claims of religious freedom infringement at pages 28 and 29 of her brief in reply to the Hawkins County Board of Education's appeal filed with the Sixth Circuit on March 24, 1987:

> In the *Mozert* case, Frost was compensated for violations of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights.

Petitioner's unequivocal disclaimer of any religious First Amendment issues being involved in her appeal should preclude her successfully asserting them now as a basis for certiorari.

The record developed at the trial of this false arrest case cannot support a review of any issues related to First Amendment rights. Evidence relating to the "sincerity" of religious beliefs, evidence of the reasons for the expulsion of unnamed students who were not involved in this false arrest case, and an examination of valid grounds for "exempting" unnamed students from certain required reading courses were never considered in this case and cannot constitute grounds for review. The record simply does not support the petitioner's claim that important constitutional issues are involved in this case.

The petitioner makes numerous references to *Wisconsin v. Yoder*, 406 U.S. 205 (1972). An examination of *Yoder* substantiates the inappropriateness of the Court's reviewing the present case. In *Yoder*, the Court emphasized that personal and philosophical beliefs were not equivalent to religious beliefs which had to be accommodated by the public school system. *Id.* at 215, 216. The Court analyzed the "quality" of the religious freedom

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